83-1550

No. ——

IN THE

Supreme Court of the United States

October Term, 1983

LITTON SYSTEMS, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether under the *Barker v. Wingo* balancing test the burden shifts to the government to prove absence of defense prejudice once the defendant has demonstrated (a) deliberate and unexcused failure to prosecute for over three and one-half years, and (b) the loss of critical exculpatory evidence during that period?

2. Whether under the *Barker v. Wingo* balancing test a defendant seeking to show defense prejudice must prove that but for the prosecution's delay, he could have proven his innocence at trial?

3. Whether a judicial forewarning must precede dismissal under Federal Rule of Criminal Procedure 48(b) despite an admittedly deliberate failure to prosecute for over three and one-half years?

4. Whether seven years of "reprehensible" and "intolerable" prosecutorial abuse, including the vindictive procurement of an indictment and the deliberate abandonment of prosecution for three and one-half years, compels dismissal of the indictment?

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Petitioner, Litton Systems, Inc. ("Litton"),[1] respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 13, 1984.

OPINIONS BELOW

The May 25, 1977 memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia, Honorable Albert V. Bryan, Jr., dismissing the indictment in this case on the ground of prosecutorial misconduct, is not reported and appears in the appendix at A-48. The April 4, 1978 Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit vacating Judge Bryan's Order are reported at 573 F.2d 195, *cert. denied*, 439 U.S. 818 (1978), and appear in the appendix at A-34.

1. Petitioner, Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division, is a wholly-owned subsidiary of Litton Industries, Inc.

The December 23, 1982 Order of the United States District Court for the Southern District of Mississippi, Honorable Adrian G. Duplantier, dismissing this indictment for a *second time* on the grounds of unconstitutional and "intolerable" prosecutorial delay is not reported and appears in the appendix at A-15. The January 7, 1983 Judgment in favor of Litton dismissing the indictment is not reported and appears in the appendix at A-16. Judge Duplantier's March 1, 1983 Opinion is reported at 557 F. Supp. 568 and appears in the appendix at A-17. The January 13, 1984 Opinion of the United States Court of Appeals for the Fifth Circuit vacating Judge Duplantier's Order is reported at 722 F.2d 264 and appears in the appendix at A-1. The January 13, 1984 Judgment of the United States Court of Appeals for the Fifth Circuit is not reported and appears at A-60. The February 7, 1984 *per curiam* Order of the United States Court of Appeals for the Fifth Circuit denying Litton's Petition for Rehearing and Suggestion for Rehearing *En Banc* is not reported and appears in the appendix at A-61.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 13, 1984. Litton's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on February 7, 1984, and this Petition was filed within sixty days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be de-

prived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

Section 287 of Title 18, United States Code, provides as follows:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rule 48(b) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

"[I]f there is unnecessary delay in bringing a defendant to trial, the Court may dismiss the indictment. . . ."

STATEMENT OF THE CASE

The "reprehensible" and "intolerable" prosecutorial abuses in this seven-year old criminal case have compelled *two* different United States District Courts — the Eastern District of Virginia and the Southern District of Mississippi — *twice* to impose the unusual and extreme sanction of dismissal.[2]

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2. In Virginia, Judge Bryan described as "reprehensible" the government's "*threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award [against the Navy] to which Litton was entitled." (A-53.)

Following remand by the Fourth Circuit and transfer to Mississippi, Judge Duplantier described as "intolerable" the government's subsequent abandonment of the case and belated attempt to revive it in response to political pressure after three and one-half years of deliberate failure to prosecute. (A-33.)

A. "Reprehensible" Prosecutorial Misconduct: The Government Vindictively Indicted Litton When It Refused To Forego The Finality Of A Civil Award.

Litton was indicted in the Eastern District of Virginia on April 6, 1977 for filing, in 1970, an allegedly false claim against the Navy in violation of 18 U.S.C. §287. Shortly thereafter, the indictment was dismissed by The Honorable Albert V. Bryan, Jr., sitting in the Eastern District of Virginia, for "deliberate and disingenuous" prosecutorial misconduct. (A-57). The record before Judge Bryan revealed the following facts:

In April, 1976, Litton had prevailed before the Armed Services Board of Contract Appeals ("ASBCA") in a civil dispute with the Navy relating to the construction, beginning in 1968, of three nuclear submarines. (A-49.) While litigating the civil case, the Navy persuaded the government to commence a grand jury investigation of Litton's claim. Evidence was presented before *three* grand juries *without any indictment* being returned.[3]

In September, 1976, shortly before the third (special) grand jury's eighteen month term expired, although the prosecutors *admitted* that they had *no evidence of criminal intent*, they nevertheless threatened to indict Litton unless it would agree to reopen the final $17 million ASBCA civil award. (A-54-55.)[4]

When Litton rejected this extortionate demand, the prosecutors retaliated by presenting incomplete and inaccurate summaries of the prior grand jury evidence to yet a *fourth* grand jury, which finally did return a one count indictment against the corporation only. As Judge Bryan noted:

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3. The third grand jury, which did not indict, had been specially impanelled for the *sole* purpose of investigating Litton.

4. In rejecting the prosecutors' efforts to justify this action as analogous to a Pretrial Diversion Program, Judge Bryan succinctly observed:

> "The Pretrial Diversion Program is a judicially sanctioned plan designed for rehabilitation of persons who *admit their guilt*, without formal charges being brought. Here, not only at a time when the defendant was protesting its innocence, but *at a time when the government, according to its brief, had no evidence of criminal intent*, the investigating grand jury was used as a bargaining tool to effect a reopening of the matter before the ASBCA." (A-54-55, emphasis added.)

> "The appearance and summation testimony before the grand jury of the two [FBI] agents is relevant . . . to the issue of the misconduct of the United States Attorney's Office. One need not be a skeptic to question the impartiality of a presentation which persuaded a grand jury that neither had heard nor seen the previous witnesses or documents to do within ten days what the prior grand jury had not seen fit to do after twenty-five days of evidentiary hearing over an eighteen month period. This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney." (A-55-56.)

Thus, Judge Bryan found that the prosecutors' "reprehensible" conduct required dismissal of the indictment:

> "No matter how benign a view of the matter is urged by the government, the truth is that the government wanted a 'second bite at the apple' in its controversy with Litton over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when Litton, as was its right, refused to forego that entitlement, namely, the finality of the civil award, *the government retaliated — made good its threat — by producing an indictment*. This is a serious abuse of prosecutorial power." (A-53; emphasis added.)

Relying solely on its misinterpretation of this Court's opinion in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the United States Court of Appeals for the Fourth Circuit concluded that the government's use of the threat of indictment to obtain an advantage in its *civil* dispute with Litton was "permissible plea bargaining" — even though no plea ever had been considered in the case and even though the so-called "plea bargaining" occurred when the prosecutors admittedly had *no evidence of criminal intent*. *United States v. Litton Systems, Inc.*, 573 F.2d 195 (4th Cir.) *cert. denied*, 439 U.S. 828 (1978).[5] Following re-

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5. Several commentators have severely criticized the Fourth Circuit's Opinion. See Part III, *infra*.

mand to the Eastern District of Virginia in December, 1978, the case was transferred to the Southern District of Mississippi where the submarines had been built.

B. Unconstitutional and "Intolerable" Prosecutorial Delay: The Government Abandoned This Case In 1979 And Then Attempted To Revive It Three And One-Half Years Later Solely In Response To Political Pressure.

In early 1979, shortly after transfer to the Southern District of Mississippi, the government *abandoned* this prosecution. After three and one-half years of deliberate failure to take a single step, however, the government attempted to reverse its course and, without warning or explanation, moved on September 22, 1982, to set a trial date. On Litton's motion, the indictment was again dismissed, this time by Judge Adrian G. Duplantier of the Eastern District of Louisiana, sitting by designation in the Southern District of Mississippi, for inexcusable and prejudicial delay. *United States v. Litton Systems, Inc.*, 557 F.Supp. 568 (S.D. Miss. 1983).

At the hearing on Litton's Motion, the Government *conceded* that it had *disbanded its trial team* and had *deliberately* failed to take a single prosecutorial action *for more than 3½ years*. (A-23.)[6] Significantly, during a brief period of negotiations to settle both the criminal and civil aspects of this controversy, the government drafted a proposed settlement document conceding, *more than four years ago*, that the evidence upon which a criminal fact finder would have to base ultimate conclusions had become "stale." (A-72.)[7]

The record further revealed that in January and February of 1982, Admiral Hyman Rickover and Senator William Proxmire had written letters to Attorney General William French Smith

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6. Judge Duplantier noted the government's admission that "in fact no action was taken because the prosecution was satisfied with the status quo and with not proceeding to trial." (A-23.)

7. The Government's written admission in this regard was accurate, since the facts underlying this twice-dismissed indictment date back to 1968, and the allegedly false claim itself was filed in November, 1970.

demanding to know, *inter alia*, why the Litton prosecution had been dropped. According to the government's own affidavit, the decision to "reassemble" a trial team was made shortly after these letters were received by the Department of Justice. (A-23.)

In contrast to the government's deliberate failure to proceed, Litton had actively prepared its trial defense. A government document in the record confirmed that in January, 1979, at the first status conference following transfer, Litton joined with the Government in requesting a trial date. (A-63.) In January, 1980, during the brief settlement negotiations, Litton notified the Government that its trial preparation was complete. Thereafter, Litton also notified the government that any agreement to suspend the criminal proceedings during the five weeks of unsuccessful settlement negotiations was terminated. (A-26.)

It was undisputed that *four* defense witnesses died during the period of abandonment — David Adams (died in May, 1980), Keistutis Verseckis (September, 1980), J. Marshall Dickens (January, 1981), and Curtis Scott (March, 1981). (A-73-75.)[8] In addition, despite a court order requiring production of documents, a large number of exculpatory documents had been lost or destroyed by the Government.[9]

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8. *David Adams*, who the government admits would have been a "key" witness, prepared the manpower charts which the government contends form the heart of the alleged fraud, and would have testified that they were prepared in good faith. In preparing for trial, Adams described to one of Litton's counsel (1) the manner in which he worked on the manpower charts, (2) his belief that the charts were prepared accurately, and (3) his knowledge that there had been no intent to defraud the government. *Keistutis Verseckis* was an accountant who had prepared critical escalation calculations in the allegedly false claim and thus would have offered important testimony regarding its fairness and accuracy. *Curtis Scott*, Ingalls' hull foreman, and *J. Marshall Dickens*, a contract administrator, would have offered testimony concerning the government's disruption of Litton's construction schedule and would have contradicted the government's contentions regarding Litton's initial capability of performing the contract. (A-73-75, A-78-79.)

9. Among this lost evidence were 55 boxes of documents which Litton produced to the Navy during an audit of the allegedly false claim. These documents would have demonstrated that the Navy was fully informed of all relevant facts regarding Litton's claim, thereby refuting the prosecution's allegation that the claim was intentionally falsified. (A-75-77.)

In view of the virtually undisputed factual record and the government's clear admissions at the hearing, Judge Duplantier concluded, *inter alia*:

(1) The government had *abandoned* this prosecution and belatedly attempted to resurrect it only in response to political pressure.

(2) Litton reasonably had concluded that the case had been abandoned by the government:

> "As far as Litton knew, or any other reasonable defendant would have believed, the case had been abandoned by the United States. Certainly *the record supports the conclusion that the government had abandoned the prosecution* and decided to resurrect it shortly before the motion to set a trial date. . . .
>
> The government's decision to *reassemble* its trial team was not made until May 24, 1982, and not announced until September 22, 1982, when the motion to set for trial was filed. There is strong evidence that the May 24th decision was made only after pressure upon the Justice Department from prominent political figures." (A-23; emphasis added.)

(3) Under the circumstances, Litton had sufficiently asserted its speedy trial right:

> "Under the unusual circumstances of this case, Litton's conduct was sufficient to constitute its assertion of its Sixth Amendment speedy trial right. . . .
>
> Certainly, it was reasonable for Litton to have concluded that the indictment was not being pursued. Under the circumstances, Litton should not be charged with the responsibility of taking any further action to bring the criminal charge against it to trial." (A-26-27.)

(4) Litton had been *irreparably prejudiced* by the government's deliberate decision not to proceed: "Litton has demonstrated 'actual prejudice to the conduct of the defense.' " (A-29.)

(5) "The length of delay and the reasons therefor are, at the least, intolerable, if not unconstitutional." (A-33.)

Accordingly, the District Court dismissed the indictment for violation of Litton's constitutional speedy trial right and for want of prosecution under Rule 48(b) of the Federal Rules of Criminal Procedure.

The United States Court of Appeals for the Fifth Circuit reversed, reinstating the 1977 indictment for a second time. Although Litton's Motion to Dismiss had specifically limited its scope to the three and one-half year period of *admittedly deliberate failure to prosecute*, from March, 1979, to September, 1982, the Fifth Circuit's Opinion inexplicably dwelled almost exclusively upon the period from the indictment in April, 1977 to early 1979, a period of delay recognized by all to be excusable.

Further, although the government *conceded* that the three and one-half year delay was "presumptively prejudicial," the Fifth Circuit summarily decided that prejudice was "minimal." (A-11.) The Opinion ignored the undisputed record fact that *four* defense witnesses had died during the period of abandonment, erroneously stating that only one, David Adams, was alive as of January, 1980. (A-12.)[10] With respect to the loss of Adams, whose significance as a "key witness" was conceded by the government, the Fifth Circuit brushed aside defense impairment with the speculative conclusion that his exculpatory testimony as a defense witness could have been "impeached" with his grand jury testimony. (A-12.) Thus, usurping the factfinder's role, the Fifth Circuit held that it could assess credibility — a jury determination — to rebut a claim of prejudice caused by the death of a key defense witness.[11]

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10. Also ignored by the Fifth Circuit was the death, in March, 1983, of Robert E. Davis, Esquire, Ingalls' Deputy General Counsel. During Litton's trial preparation, David Adams made exculpatory statements to Mr. Davis, which were described in an affidavit made part of the record before Judge Duplantier. (See footnote 8, *supra*.) Moreover, Davis was the only representative of Litton with a continuous, uninterrupted participation in and knowledge of this matter since 1968. (A-85-86.)

11. This "impeachment" determination was totally without record support. First, Adams' grand jury transcripts were *not* part of the record before the Fifth Circuit. Second, Adams' lost exculpatory testimony had nothing to do

(*continued next page*)

While recognizing that Litton had been deprived of helpful testimony, the Fifth Circuit found an absence of prejudice because it concluded that the lost testimony would not *necessarily* have constituted a successful defense. Thus, in derogation of this Court's explicit direction in *Barker v. Wingo*, 407 U.S. 514 (1972), the Court below gravely misjudged the actual prejudice inflicted upon Litton's defense by the death of four exculpatory witnesses. With respect to the documents lost or destroyed by the government, the Fifth Circuit paradoxically cited the district judge's conclusion that "compelling Litton to stand trial without these lost documents is not as clearly prejudicial as is the absence of the deceased witness, Adams." (A 11-12.)

Finally, the Fifth Circuit summarily reversed Judge Duplantier's discretionary dismissal under Rule 48(b), holding that even after three and one-half years of admittedly deliberate failure to prosecute, "forewarning" of dismissal was required.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER THE MEANING OF *BARKER V. WINGO*.

The Fifth Circuit's reversal compels this Court to clarify the *Barker v. Wingo* balancing test.[12] The Circuits now disagree sharply as to the quantum and burden of proof necessary to

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NOTE—(*Continued*)

with his grand jury testimony. Moreover, the Fifth Circuit entirely ignored the crucial aspect of prejudice before Judge Duplantier. In the district court, the government did not suggest that Adams' exculpatory testimony could have been "impeached", but rather insisted that his testimony was "preserved" by the grand jury transcripts. In rejecting this response, Judge Duplantier wrote:

> "Not surprisingly, defendant is not comforted by that explanation. The fact that such testimony, elicited without cross-examination, without representation by counsel, and without regard for the rules of evidence, may be admitted at trial *compounds* the problem of potential prejudice." (A-30.)

12. *Barker v. Wingo*, 407 U.S. 514, 530 (1972), held that four factors must be weighed in determining a speedy trial claim: (1) length of delay; (2) reasons for delay; (3) assertion of the right; and (4) prejudice to the defense caused by the delay.

demonstrate defense prejudice resulting from deliberate prosecutorial delay. A defendant seeking pre-trial dismissal in the Fifth Circuit must now establish that *but for* the government's delay, he could have proven his innocence at trial. Not only is this contradicted by the language of *Barker* itself, it conflicts with the constitutional presumption of innocence accorded every defendant.[13]

A. The Fifth Circuit's Misinterpretation Of *Barker* Creates A Conflict Among The Circuits

Mindful of this Court's pronouncement in *Barker v. Wingo* — *"If witnesses die or disappear during a delay, the prejudice is obvious,"* 407 U.S. at 532 — other Circuits have correctly held that under *Barker* the death of a defense witness during a period of prosecutorial delay constitutes defense prejudice, which, at the very least, shifts to the government the burden of proving the absence of prejudice.

For instance, in *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973), the Seventh Circuit discharged two defendants on speedy trial grounds, holding that they had been prejudiced by the death of their co-defendant:

> "With respect to actual prejudice to the appellants' ability to defend themselves, the record discloses that one eyewitness to the crime, a former co-defendant, died before the case was eventually brought to trial. While it is true, as the Government argues, that the record does not indicate whether the testimony would have been helpful, or even available, to the appellant, we cannot gainsay that it would have been. Certainly the death of a witness with firsthand knowledge of the events in issue creates the strong possibility of prejudice to a defendant."

486 F.2d at 754. Likewise, the First Circuit, in *United States v. Fay*, 505 F.2d 1037, 1040 (1st Cir. 1974) discharged a defendant

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13. It also would compel every defendant seeking vindication of speedy trial rights before trial to afford the prosecution unparalleled discovery of any anticipated trial defense.

on speedy trial grounds because of the death or disappearance of an arguably helpful defense witness:

> "If, after an over long and unjustified passage of time, a known witness, as to whom there exists substantial reason to believe that he would have given specific and relevant testimony, is not available, through no connivance of the defendant, it seems to us that the disadvantage must fall to the government, which has the primary burden of expedition."

Macino and *Fay* are not isolated holdings, but represent the well-settled doctrine by which federal courts show their strong disapproval of forcing defendants to trial once relevant evidence is no longer available because of prosecution delay.[14] Indeed, this Court in *Barker* explicitly adopted the most compelling of these decisions:

> "For an example of how the speedy trial issue should be approached, see Judge Frankel's excellent opinion in *United States* v. *Mann*, 291 F.Supp. 268 (S.D.N.Y. 1968)."

Barker v. *Wingo* at 533 n.36. In *Mann*, Judge Frankel dismissed an indictment before trial, ruling that the death of an arguably relevant witness — one Charles Simmons, Sr. — combined with

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14. *Accord*, *Dickey* v. *Florida*, 398 U.S. 30 (1970); *United States* v. *New Buffalo Amusement Corp.*, 600 F.2d 368, 379 (2d Cir. 1979); *United States* v. *McConahy*, 505 F.2d 770, 772 (7th Cir. 1974); *Stuart* v. *Craven*, 456 F.2d 913, 916 (9th Cir. 1972). *See United States* v. *Gouveia*, 704 F.2d 1116, 1127 (9th Cir. 1983) (*en banc*). (Court analogizes to *Barker* four-prong test and holds that government must rebut presumed prejudice to defense caused by tardy appointment of counsel during preindictment delay); *United States* v. *Dreyer*, 533 F.2d 112, 115 (3d Cir. 1976) (Court recognizes that the death of defense witnesses during government's pretrial delay is prejudicial); *United States* v. *Rucker*, 464 F.2d 823, 826 (D.C. Cir. 1972) ("Seemingly overwhelming evidence of guilt can on occasion result from impairment of the defense capacity by reason of delay.") *See also Dufield* v. *Perrin*, 470 F.Supp. 687, 691-92 (D.N.H. 1979); *United States* v. *Starr*, 434 F.Supp. 214 (D.D.C. 1977); *United States* v. *Judge*, 425 F.Supp. 499, 504 (D. Mass. 1976); *United States* v. *Dowl*, 394 F.Supp. 1250, 1256-57 (D. Minn. 1975); *United States* v. *Perry*, 353 F.Supp. 1235, (D.C.D.C. 1973); *United States* v. *Kleinhard*, 333 F.Supp. 699, 701-02 (E.D.Pa. 1971); *United States* v. *McKee*, 332 F.Supp. 823, 826 (D. Wyo. 1971); *State* v. *Ivory*, 278 Or. 499, 564 P.2d 1039 (1977); *Commonwealth* v. *Clark*, 443 Pa. 318, 279 A.2d 41 (1971).

lengthy prosecution delay, had prejudiced the defendant and thus violated the Sixth Amendment:

> "To summarize, then, on the question of whether the delay has hurt the defense, this is not a point to be resolved with mathematical certainty. What is clear, however, apart from *the weighty presumption of prejudice where the delay is as long as it has been in this case*, is that defendant's specific claims of prejudice are substantial. The quarrel about the degree and kind of damage from the death of Simmons, Sr., is incapable of satisfactory resolution by weighing the competing offers of hearsay. But we can know that *the search for truth has been severely hampered* and that, on this and other aspects, defendant has demonstrated 'the likelihood, or *at least the reasonable possibility that [he] has been prejudiced by the delay*'. [Citation omitted]."

United States v. Mann, *supra*, 291 F.Supp. at 273. (Emphasis added.)

The Fifth Circuit's unreasoned rejection of this compelling rationale is especially unjust because — unlike the defense witnesses in *Fay* or *Macino* or *Mann* — the dead witnesses in this case *unquestionably* would have supplied vital exculpatory testimony. Recognizing this, Judge Duplantier dismissed under *Barker* because the government admittedly failed even remotely to *disprove* the resulting prejudice to Litton. (A 29.) The Fifth Circuit was obligated under *Barker* to impose this same burden upon the government. Its failure to do so not only conflicts with *Barker* and decisions in several circuits, it severely distorts the search for truth and justice in this case.[15]

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15. Commentators have explicitly recognized this division regarding burden and quantum of proof of prejudice under *Barker*:

> "The Supreme Court has not yet ruled on who has this burden and the lower court cases appear to be divided into three categories as to burden of proof: (1) The accused must make a showing of prejudice which is dispositive of the issue of prejudice; (2) prejudice is presumed from long delay and such presumption is dispositive of the issue of prejudice; and (3) prejudice must either be shown by the accused or presumed from long delay, but in either case the government may overcome such proof or presumption by showing either that the delay was the result of a valid police

(*continued next page*)

B. The Fifth Circuit's Misreading Of *Barker* Severely Undermines The Presumption Of Innocence And Unjustly Alters The Law Of Pre-Trial Prosecution Discovery Of A Defendant's Evidence And Strategy

The Fifth Circuit's decision has significant due process implications: 1) it severely undermines the fundamental presumption of innocence accorded to every defendant; and 2) it unjustly and unnecessarily alters the law of pre-trial discovery.

This Court has repeatedly held that the presumption of innocence is the very cornerstone of due process:

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal laws.' *Coffin* v. *United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)."

Taylor v. *Kentucky*, 436 U.S. 478, 483 (1978).[16] This means a great deal more than simply placing the burden of proof upon the government in every prosecution:

> "It is now generally recognized that the 'presumption of innocence' is an inaccurate shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion. . . .' "

NOTE—(*Continued*)

purpose or that the accused suffered no serious prejudice other than that resulting from ordinary and inevitable delay."

Note, "The Speedy Trial Guarantee: Criteria And Confusion In Interpreting Its Violation," 22 *DePaul Law Review* 839, 855-56 (1973). *Accord*, Uviler, "*BARKER* V. *WINGO*: Speedy Trial Gets A Fast Shuffle," 72 *Columbia Law Review* 1376, 1393-95 (1972); Godbold, "Speedy Trial — Major Surgery For A National Ill," 24 *Alabama Law Review* 265, 282-85 (1972). See Note, "Speedy Trial Schemes And Criminal Justice Delay," 57 *Cornell Law Review* 794, 813-14 (1972); Comment, "Constitutional Right To A Speedy Trial: The Elements Of Prejudice And the Burden Of Proof," 44 *Temple Law Quarterly* 310, 315-18 (1971); Note, "The Right To A Speedy Trial," 20 *Stanford Law Review* 476, 498 (1968).

16. *Accord*, *Estelle* v. *Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970). Cf., *Brinegar* v. *United States*, 338 U.S. 160 (1949); *Davis* v. *United States*, 160 U.S. 469 (1895); *Miles* v. *United States*, 103 U.S. 304 (1881).

Taylor v. Kentucky, supra, 436 U.S. at 483 n.12.

Likewise, this Court has recognized the principle that the government's right to pre-trial discovery of the defense in a criminal prosecution is restricted to reciprocal notice of alibi and rebuttal witnesses or similarly limited reciprocal arrangements:

> "[W]e do hold that in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for their own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state."

Wardius v. Oregon, 412 U.S. 470, 475-76 (1973). *Accord, Williams v. Florida*, 399 U.S. 78 (1970). *See*, Blumenson, "Constitutional Limitations On Prosecutorial Discovery," 18 *Harvard Civil Rights. Civil Liberties Law Review* 123 (1983); Louisell, "Criminal Discovery and Self Incrimination: Roger Traynor Confronts the Dilemma," 53 *California Law Review* 89 (1965).

The Fifth Circuit's misreading of *Barker* below has radically altered these virtually axiomatic principles.

It cannot reasonably be disputed that the deaths of critical witnesses impaired Litton's defense. Indeed, the record plainly shows that *their testimony would have directly refuted the heart of the government's case*. (A 73-75; A 78-79.) The Fifth Circuit nonetheless substituted itself for the jury and held that under *Barker* this was not prejudicial because these witnesses either were not sufficiently helpful or might have been "impeached."[17]

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17. The Fifth Circuit thereby repudiated its own precedent, squarely rejecting this kind of appellate fact finding in *Arrant v. Wainwright*, 468 F.2d 677 (5th Cir. 1972):

> "The state asserts that appellant was not prejudiced by the deprivation of this witness at trial. First, the state claims that it could have impeached [the witness's] testimony through the use of her inconsistent statements. This is definitely not a matter within the state's power to unilaterally decide. . . .

(continued next page)

In other words, the Fifth Circuit found an absence of prejudice not because it disputed that Litton was denied helpful testimony, but because it concluded that the lost testimony would not necessarily have constituted a successful defense. *Compare*, *United States v. Macino*, *supra*, *United States v. Fay*, *supra*.

Thus, in the Fifth Circuit's view, *Barker* requires a defendant alleging prejudice to prove to the trial court, *before the first prosecution witness has been called*, that he had a successful defense that was destroyed by the government's delay. This astonishing misreading of *Barker* makes mutually exclusive a defendant's right to a speedy trial and his right to be accorded the presumption of innocence. Should he seek vindication of his speedy trial rights before trial, he can no longer exercise his right "to remain inactive and secure until the prosecution has taken up its burden." Rather, he must prove his innocence to a judicial fact-finder.

This Hobson's Choice — abandonment either of the presumption of innocence or the right to a speedy trial — is even more inequitable because it forces a defendant who exercises his speedy trial rights to give up his right not to disclose fully his trial defense until the prosecution rests.

This Court has held that "an accused who does successfully establish a speedy trial claim before trial will not be tried." *United States v. MacDonald*, 435 U.S. 850, 861 n.8 (1978). The Fifth Circuit's holding has made pre-trial vindication of speedy trial rights a virtual impossibility.

NOTE—(*Continued*)

> "It is *appalling to this court* for the state to claim that its action which ultimately led to the witness not testifying was harmless since [the state] could have impeached her. Impeachment is a quite tricky exercise. Under our system of criminal justice, the *ultimate question of credibility is for the jury*. Perhaps [the witness] could have satisfactorily explained the inconsistencies [if any] to the jury's satisfaction. Due to the actions of the state, the jury was not given the opportunity to pass on these credibility matters. . . . We *shall not sanction* unilateral state action which, in substance, deprives the jury of its right to determine credibility *by finding that the deprivation of* [the witness's] *testimony was harmless due to a claim of impeaching evidence*."

468 F.2d at 683. (Emphasis added).

II. THE FIFTH CIRCUIT'S TREATMENT OF THE DISTRICT COURT'S DISMISSAL FOR WANT OF PROSECUTION UNDER F.R.CRIM.P. 48(b) HAS CREATED A SPLIT IN THE LAW OF THE CIRCUITS AND HAS ELIMINATED RULE 48(b) AS A JUDICIAL TOOL FOR THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE.

That the delay in this case was "unnecessary" and that the government's admitted failure to act for three and one-half years was a "want of prosecution" are beyond dispute. Having concluded that the government *abandoned* this case and only revived it in response to political pressure, Judge Duplantier dismissed the indictment pursuant to his discretion under Rule 48(b).[18] The Fifth Circuit made no finding that Judge Duplantier had abused his discretion — nor could it have done so in light of the extraordinary record in this case — but it nevertheless summarily reversed.[19] The sum total of the Fifth Circuit's "review" of Judge Duplantier's exercise of his discretion under Rule 48(b) was a single confusing paragraph:

> "The record demonstrates that the government never requested a continuance or deliberately delayed the prosecution. [Note disregard of three and one-half years of admittedly deliberate failure to prosecute.] There is no seri-

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18. F.R.Crim.P. Rule 48(b) provides, in pertinent part:

> "[I]f there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment. . . ."

The Advisory Committee Note to Rule 48(b) states:

> "This rule is a restatement of the inherent power of a court to dismiss a case for want of prosecution. *Ex parte Altman*, 34 F.Supp. 106 (S.D. Cal. 1940)."

19. It is axiomatic that the standard of review is abuse of discretion. *See, e.g., United States* v. *Palmer*, 502 F.2d 1233, 1234 n.3 (5th Cir.) *reversed on other grounds*, 423 U.S. 64 (1974); *United States* v. *Correia*, 531 F.2d 1095, 1099-1100 (1st Cir. 1976); *United States* v. *Lane*, 561 F.2d at 1075, 1078 (2d Cir. 1977); 1078; *United States* v. *Scott*, 518 F.2d 261, 269 (6th Cir. 1975); *United States* v. *Lee*, 413 F.2d 910, 912 (7th Cir.), *cert. denied*, 396 U.S. 1022 (1969); *United States* v. *Kitzman*, 520 F.2d 1400, 1402 (8th Cir. 1975); *United States* v. *Moore*, 653 F.2d 384, 389 (9th Cir.), *cert. denied*, 102 S.Ct. 680 (1981); *United States* v. *DeDiego*, 511 F.2d 818, 824 (D.C. Cir. 1975).

> ous suggestion of prosecutorial bad faith. The delays occasioned by Litton's various legal initiatives in 1977, 1978 and 1979 [Note failure even to mention the critical years of 1980, 1981, and 1982] cannot be attributed to the prosecution. There was no constitutional deprivation, and peremptory dismissal without forewarning, followed by [sic] a long period of acquiescence in the delay, was not appropriate." (A-14.)[20]

Most critical for this Court's consideration is that the Fifth Circuit apparently now requires "forewarning" to the prosecution before a district judge can exercise his discretion to dismiss for unnecessary delay even in a case which has been abandoned for three and one-half years.[21] A split in the law of the Circuits has thus been created and, in the process, Rule 48(b) has been emasculated as a judicial tool for the effective administration of criminal justice.

Rule 48(b) codifies the common law power of a court to control its own docket. *Ex Parte Altman*, *supra*. Virtually every Circuit to address the question has held that the district courts' power to dismiss under Rule 48(b) is not confined to constitutional violations.[22] It follows *a fortiori* that "forewarning", which is not required for speedy trial determinations, could never be a

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20. Presumably the Fifth Circuit intended to say "following" rather than "followed by."

The Fifth Circuit disregarded the record, *inter alia*, by (1) ignoring that most of 1977 and 1978 were taken up by the *government's* appeal from the original dismissal for prosecutorial misconduct, (2) conspicuously omitting reference to the years 1980, 1981, and 1982, the *sole* period of delay to which Litton's motion was directed, and (3) ignoring that the government had actually *admitted* before Judge Duplantier that it had consciously and deliberately failed to proceed during the three and one-half year period from March, 1979, to September, 1982. (A-21-23.)

21. As Judge Duplantier so perceptively asked, "How about thirty years? How about eighteen? Four, six, where?" (A-83.)

22. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits have all held that Rule 48(b) is broader then the Sixth Amendment. *United States v. DeLeo*, 422 F.2d 487, 495 (1st Cir), *cert. denied*, 397 U.S. 1037 U.S. 1037 (1970); *United States v. Lane*, 561 F.2d 1075, 1078 (2d Cir. 1977); *United States v. Dreyer*, 533 F.2d

(*continued next page*)

general prerequisite for Rule 48(b) dismissals. Indeed, Rule 48(b) has been commonly applied to dismiss indictments for want of prosecution without any suggestion whatsoever that judicial "forewarning" would be prerequisite to such action [23] In this case, faced with "explanations" of the government's inactivity that amounted to clear admissions of deliberate failure to prosecute during the period of extraordinary delay, Judge Duplantier framed the threshold issue before him at the hearing on Litton's motion to dismiss:

> "The problem that I have to weigh is what is the Government's obligation with respect to that. Could the Government remain happy for twenty years and then say, 'Well, you didn't ask for a speedy trial. We didn't. We were happy. You were happy. We now want to try the case.' How about thirty years? How about eighteen? Four, six, where? That is really what is before me." (A-83.)

Rule 48(b)'s dismissal sanction was intended to codify the federal courts' inherent power to solve this precise problem. The Criminal Rules Advisory Committee underscored that absent the power to dismiss for want of prosecution, the courts would be without power to prevent the government from abusing its prerogative of when or whether to move for trial. As articulated by

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NOTE—(*Continued*)

112, 113 n.1 (3d Cir. 1976); *United States* v. *Novelli*, 544 F.2d 800, 803 (5th Cir. 1977); *United States* v. *Scott*, 518 F.2d 261, 269 (6th Cir. 1975); *United States* v. *Clay*, 481 F.2d 133 (7th Cir. 1973); *United States* v. *Crow Dog*, 532 F. 2d 1182, 1194 (8th Cir. 1976); *United States* v. *Simmons*, 536 F.2d 827, 833 (9th Cir. 1976); *United States* v. *Stoker*, 522 F.2d 576, 580 (10th Cir. 1975); *Mathies* v. *United States*, 374 F.2d 312, 314-15 (D.C. Cir. 1962).

23. *See*, e.g., *United States* v. *Correia*, 531 F.2d 1095 (1st Cir. 1976); *United States* v. *Dreyer*, 533 F.2d 112 (3d Cir. 1976); *United States* v. *Mann*, 291 F.Supp. 268 (S.D.N.Y. 1968); *United States* v. *Mark II Electronics of Louisiana, Inc.*, 305 F.Supp. 1280 (E.D. La. 1969); *United States* v. *Kleinbard*, 333 F.Supp. 699 (E.D. Pa. 1971); *United States* v. *Seafarers International Union*, 343 F.Supp. 779 (E.D.N.Y. 1972); *United States* v. *Price*, 373 F.Supp. 825 (W.D. Mo. 1974); *United States* v. *Doud*, 394 F.Supp. 1250 (D.C. Minn. 1975); *United States* v. *Roubotham*, 430 F.Supp. 1254 (D. Mass. 1977); *United States* v. *Quillen*, 468 F.Supp. 480 (E.D. Tenn.), *aff'd* 588 F.2d 831 (6th Cir. 1978).

the now classic decision in *Ex parte Altman*, 34 F.Supp. 106, 108 (S.D. Calif. 1940):

> "We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring them to trial. And yet, if the prosecutor should refuse to try them, and the court acquiesce, they would be at his mercy."

In reversing Judge Duplantier's discretionary dismissal, the Fifth Circuit emasculated the district courts' power to control their own dockets and abrogated Rule 48(b)'s unique protection against prosecutorial abuse. If the district courts were required to "forewarn" the prosecution of a potential dismissal, no matter how egregious the delay, the government would be encouraged to adopt a "heads-I-win-tails-you-lose" position, for its complacency, no matter how prolonged, could be punished by no more than a simple admonition to proceed.

Prior to this case, the concept of "forewarning" as a prerequisite to dismissal under Rule 48(b) was virtually unheard of, having been limited to a few exceptional cases where the delay was brief, the prosecution *was proceeding in the normal course*, and no reasonable person could have anticipated dismissal. In *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979), for example, the lower court dismissed an indictment with prejudice within only six months of the defendant's arrest because the government indicated that it would appeal an unfavorable suppression ruling. The Ninth Circuit reversed, holding that without "forewarning," the government could not have reasonably anticipated that taking a good faith appeal from a suppression ruling, while otherwise proceeding in the normal course, would result in a dismissal with prejudice under Rule 48(b). 628 F.2d at 1150-51. Similarly, in *United States v. Simmons*, 536 F.2d 827 (9th Cir. 1976), a four-month old indictment had been dismissed with prejudice by the district court on Rule 48(b) grounds, despite the fact that the case was on the eve of a scheduled trial. The Court of Appeals reversed, holding that dismissal with prej-

udice could only be sustained if the prosecution were "forewarned" that so extreme a sanction would be a consequence of such minimal delay.

These cases relied upon *United States v. Clay*, 481 F.2d 133 (7th Cir. 1973), where the Court recognized the need for special caution in the application of Rule 48(b) *if* the prosecution is proceeding in the normal course. In *Clay*, the district court dismissed because of an unnecessary prosecutorial delay of eight months following the defendant's arrest. Writing for the Seventh Circuit, then Circuit Judge John Paul Stevens carefully analyzed the purpose of Rule 48(b) and explained why the district court had abused its discretion:

> " 'Rule 48(b) is a codification of the inherent power of a court to dismiss a case for want of prosecution'. . . . *If cases are completely inactive for prolonged periods, or perhaps simply too old to be kept on an active calendar, a court surely has power to enter an order of dismissal for want of prosecution even though neither litigant has been prejudiced by the delay.* Moreover, the court may properly *threaten to* enter such an order as a means of requiring litigants to pursue their matters to an expeditious conclusion. But if no unusual circumstances are shown, past delay does not justify dismissal of a case *which is in fact going forward with appropriate speed.* There were no special circumstances in this case which called for the exercise of judicial discretion. . . .
>
> The order rested on the court's holding that a period of approximately eight months of unnecessary *pre-indictment* delay required dismissal. We have no doubt that a district court has the power to promulgate a rule which would lead to the dismissal of indictments returned after such a period of unnecessary or unexplained delay. However, such a rule should be applied uniformly within the district and enforced only after the United States Attorney is aware that such a consequence will automatically follow *a delay of that magnitude.* Absent such forewarning, *or some other showing justifying an exercise of discretion in this particular*

> *case, we hold that it was error to dismiss the indictment simply because unnecessary delay of approximately eight months occurred before the indictment was returned.*"

481 F.2d at 137-38 (Emphasis added; footnotes omitted).

The holding in *Clay* is based on the valid assumption that no prosecutor reasonably could anticipate a dismissal under Rule 48(b) if a case were "going forward with appropriate speed." The eight-month pre-indictment delay in *Clay* was not considered comparable to a case — such as this one — left "completely inactive for prolonged periods," pursuant to which "a court surely has power to enter an order of dismissal for want of prosecution even though neither litigant has been prejudiced by the delay." The Fifth Circuit's decision in this case, where the prosecution was deliberately abandoned for three and one-half years, plainly conflicts with Justice Stevens' holding in *Clay*.

In *United States v. Mann*, *supra*, expressly adopted by this Court in *Barker v. Wingo* as "an example of how the speedy trial issue should be approached" 407 U.S. at 533, n.36, the government responded to a defense motion to dismiss with pretextual "excuses" for the delay and accused the defendant of "acquiescence." Judge Frankel rejected the government's position, observing:

> "It is commonly understood that the defendant will hesitate to disturb the hushed inaction by which dormant cases have been known to expire. *There is no comparable ground — at least no justification — for ambivalence in the prosecutor's office about performance of the unquestioned duty to implement the right to a speedy trial.*"

291 F.Supp. at 274-75 (Citations omitted; emphasis added.) He then dismissed the indictment, as did Judge Duplantier in this case, both on Sixth Amendment grounds and for want of prosecution under Rule 48(b). Despite this Court's explicit approval of Judge Frankel's disposition in *Mann*, that case would be summarily reversed today by the Fifth Circuit for lack of "forewarning."

If the government's deliberate failure to prosecute for three and one-half years (from March, 1979 to September, 1982) does

not qualify under Rule 48(b) as a "want of prosecution," it is difficult to imagine what ever could constitute grounds for a district court's invocation of that Rule. There could be no rational basis — and, indeed, the Fifth Circuit offered none — for requiring "forewarning" where the government deliberately has abandoned its prosecutorial duties.

Before the decision in this case, the requirement of "forewarning" in a few extraordinary cases had already created potential confusion in the administration of criminal justice under Rule 48(b). Although those cases were explainable previously because of their peculiar procedural postures, the Fifth Circuit's decision has now escalated a brewing disagreement among the Circuits into a sharp conflict. The authoritative voice of this Court must now be heard.

III. THE TOTALITY OF CIRCUMSTANCES REQUIRES THAT THIS COURT EXERCISE ITS SUPERVISORY POWERS TO CURB A CONTINUING COURSE OF "REPREHENSIBLE" AND "INTOLERABLE" PROSECUTORIAL ABUSE.

Although Litton's Motion in the district court was specifically concerned with prejudicial delay, Judge Duplantier's decision to dismiss the indictment was not made in a vacuum. Before him was a course of misconduct by the government beginning at the very inception of this prosecution:

> (1) The prosecutors vindictively made good their threat of indictment as leverage in concurrent civil litigation when Litton refused to reopen its final ASBCA award.
>
> (2) The government abandoned this case after it was transferred to Mississippi.
>
> (3) After three and one-half years of *admitted* failure to take a single action, the government, solely in response to political pressure, then sought to resurrect the indictment.

Judge Duplantier thus sought to protect the full range of judicial and constitutional controls historically imposed on the awesome powers of federal prosecutors. By ignoring the undisputed facts

of record and the settled law of this Court and other Circuits, the Fifth Circuit has eroded those controls and profoundly undermined fundamental due process rights.

The immediate problem facing the district court was the clear evidence that the government had abandoned this case and then, without any judicial control, simply arrogated to itself the decision to resurrect the indictment. Such behavior involved more than a simple matter of unjustified delay. As Judge Duplantier wrote:

> "Neat categorizations of previous decisions do not apply to the *present extraordinary situation* in which the government admits that an excessive period of inaction was the result of governmental complacency. Surely such a conscious, intentional decision not to proceed presents more than a negligent or neutral reason for delay. The decision not to seek a trial date for nearly four years was *deliberate* and thus weighs very heavily against the government." (A-25-26; emphasis added; footnote omitted.)

Judge Duplantier was also aware that the indictment had been dismissed for the first time in the Eastern District of Virginia for prosecutorial misconduct. The pertinent facts underlying that dismissal had been unaffected by the Fourth Circuit's subsequent reinstatement of the indictment:

> (1) Although the government admitted that it had *no evidence of criminal intent* — and, hence, no probable cause to indict — it nevertheless threatened to indict Litton.
>
> (2) When Litton refused, the government vindictively carried out its threat and produced an indictment using summary testimony by FBI agents, rather than by producing further evidence.
>
> (3) One of the government attorneys participating in the prosecution boasted, "Litton bought this indictment" (A-52-56.)

The district court in Virginia thus expressly concluded that the government's conduct in procuring the indictment solely for retaliatory purposes was "reprehensible." The Fourth Circuit erroneously relied upon *Bordenkircher v. Hayes*, *supra*, for the

proposition that the government's conduct was "permissible plea bargaining." In so doing, the Fourth Circuit totally ignored the undisputed fact that no "plea" had ever been considered, since the government had candidly admitted that it lacked *any* evidence of criminal intent.

An article appearing in the *Washington and Lee Law Review* in 1979, fearful that "other courts may unfortunately regard *Litton* as something other than what it is: an aberration," sharply criticized the Fourth Circuit's decision:

> "The legerdemain of the Fourth Circuit in avoiding the limitations of the *Bordenkircher* holding is remarkable. The court both cited *Bordenkircher* as controlling authority and yet evaded its express requirement of probable cause, which was essential to legitimatize the plea bargaining process. Thus, the court in one breath relied on, and in the next ignored, *Bordenkircher's* constitutional underpinnings."

Smaltz, "Due Process Limitations On Prosecutorial Discretion In Re-Charging Defendants: *Pearce* To *Blackledge* To *Bordenkircher*," 36 *Washington and Lee Law Review* 347, 373, 376 (1979). Further, the Fourth Circuit ignored the well-settled ethical prohibition against using the criminal process to gain advantage in a civil action.[24] Another law review severely criticized this aspect of the decision:

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24. The ABA Code of Professional Responsibility, DR 7-105(A), states, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." In addition, Ethical Canon 7-21 provides: "The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired . . ." *See Eaton v. Holbrook*, 671 F.2d 670 (1st Cir. 1982); *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1981); *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980); *American Acceptance Corp. v. Glendora Better Builders, Inc.*, 550 F.2d 1220 (9th Cir. 1977); *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975); *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967).

> "The potential for prosecutorial coercion . . . becomes most apparent in situations where, as in *Litton*, the Government is the prosecutor in a criminal action, as well as a party to a related civil action involving the defendant. . . . Should a party be intimidated sufficiently by the prospect of a criminal investigation and prosecution, the zealous prosecutor effectively could discourage a party from pursuing a valid claim against the government or a government agent. . . .
>
> To authorize the use of criminal investigation prior to indictment as a means of influencing a civil proceeding, especially after a grand jury has been impanelled and has failed to return an indictment, creates an atmosphere conducive to undue prosecutorial coercion and abuse. . . .

Note, "Government Use of Criminal Investigation and Indictment To Induce Reconsideration Of Adverse Civil Administrative Decisions," 15 *Wake Forest Law Review* 271, 281-282, 284 n.85 (1979).

Against this background, Judge Duplantier was faced with the fact that the government deliberately failed to proceed after the indictment had been reinstated and the case transferred to Mississippi. The misconduct in procuring the indictment and the subsequent abandonment were mutually confirmatory: The abandonment confirmed the fact that the indictment had been obtained solely for retaliatory purposes rather than in the interest of justice; the evidence of retaliatory motivation in procuring the indictment confirmed the conclusion that the admitted three and one-half year failure to take a single prosecutorial step was, in fact, an abandonment — rather than merely delay — because the government had never seriously anticipated a criminal conviction.

In sum, the record before Judge Duplantier manifested a consistent course of conduct that had originated with the government's "reprehensible" effort to use its intimidatory criminal charging power to obtain an advantage in the litigation of a civil case. The government's *de facto nolle prosse* of the indictment was no accident or mere incident of negligence. The indictment

had been obtained for reasons other than the prosecution of an actual criminal offense. So long as the indictment hung over Litton's head, the government had no serious interest in proceeding. Indeed, the only time the government litigated this case with any vigor was in defense of its "reprehensible" prosecutorial motives. Once the government's conduct had been approved by the Fourth Circuit, the government was "perfectly satisfied" with not proceeding to trial — simply holding the *threat* of prosecution over Litton's head as leverage in negotiating a settlement of the pending civil litigation before the Court of Claims.[25]

The government's subsequent motion to set a trial date, responding to political pressure after the prosecution had been abandoned for three and one-half years, thus presented the district judge with an extraordinary situation: The government had *de facto nolle prossed* an indictment that it never had intended to pursue in the first place — but now it was seeking to revive that moribund case without even a semblance of judicial or constitutional control. The grand jury's Fifth Amendment role was long in the past. Several key witnesses had died during the specific period of abandonment to which Litton's Motion was addressed. And by simply dropping the case without seeking a formal *nolle prosse*, the government had arrogated to itself the right to revive an indictment, even after a significant change of circumstances, including the deaths of exculpatory witnesses and the loss or destruction of relevant documents.

Judge Duplantier thus perceived the culmination of a course of prosecutorial malfeasance that had utterly disregarded Litton's due process rights for a period of more than six years. The judicial and constitutional controls typically implemented by the indicting process had been effectively nullified. Aggravating this already intolerable situation was the extraordinary age of events upon which factual determinations would have to be

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25 When the ASBCA issued its $17 million award to Litton, both sides agreed not to seek rehearing. The government refused, however, to pay Litton the $17 million ASBCA award, and an action to enforce the final award was therefore commenced in the Court of Claims (now the Claims Court).

made at trial. In considering prejudice to Litton's defense resulting from delay, Judge Duplantier observed:

> "[W]e note the seeming truism that the risk of prejudice is great in a complex case based on old facts. The government agrees that the present case involves an intricate set of circumstances based upon facts which occurred over fifteen years ago. Even if much of the delay in this case is viewed as justified, the fact that long periods of justified delay have occurred simply increases the possibility of serious prejudice arising during periods of unjustified delay." (A-30.)

Thus, the district court held that long periods of otherwise "justifiable delay" made it all the more incumbent upon the government to proceed expeditiously thereafter:

> "Both lengthy prior periods, the first between the alleged criminal activity and indictment, and the second between indictment and March 19, 1979, amplify the unreasonableness of any subsequent periods of unjustified delay." (A-22.)

The inescapable conclusion from the government's behavior was that its prosecutorial decisions were politically motivated at best and blatantly without regard for either ethical considerations or prosecutive responsibility.

Judge Duplantier simply could not conceive of allowing such flagrant abuse of prosecutorial power to continue without sanction. Accordingly, he dismissed the indictment both on constitutional grounds and pursuant to his clear discretion under Rule 48(b).

The Fifth Circuit's reversal ignored the entire course of prosecutorial malfeasance.[26] The Opinion simply held that prejudice to Litton resulting from the government's misconduct was "speculative", basing its conclusion on its own speculative fact

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26. It is difficult to believe that the Fifth Circuit would have countenanced the "reprehensible" and "intolerable" governmental behavior in this case were the defendant an individual and not a corporation.

finding frolic regarding the lost testimony of dead witnesses. And even apart from its errors in connection with defense prejudice caused by delay, the Fifth Circuit's short-sighted holding ignored the district court's supervisory power to dismiss an indictment as a remedy for persistent prosecutorial abuse, irrespective of prejudice to the defendant.[27] The Fifth Circuit's decision thus effectively eradicates the special obligations of government attorneys in criminal cases to prosecute fairly, diligently, and with just cause rather than from political or pecuniary motivation. Due process rights under the Fifth Amendment and the due process implications of the Sixth Amendment require that this Court now exercise *its own* supervisory power to prevent further injustice.[28]

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27. *Cf. United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979).

28. *Cf. United States v. Hale*, 422 U.S. 171, 181 (1975); *McCarthy v. United States*, 394 U.S. 459, 464 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966) (plurality); *Elkins v. United States*, 364 U.S. 206, 216 (1960); *Marshall v. United States*, 360 U.S. 310, 313 (1959); *Yates v. United States*, 356 U.S. 363, 366-67 (1958); *Grunewald v. United States*, 353 U.S. 391, 424 (1957); 28 U.S.C. §2106. *See Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (plurality); *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976); *Gaca v. United States*, 411 U.S. 618 (1973).

CONCLUSION

For the foregoing reasons, Litton respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Defendant-Appellee

No. 83-4064

United States Court of Appeals,
Fifth Circuit.

Jan. 13, 1984

Joseph A. Fisher, III, James A. Metcalfe, Asst. U.S. Attys., Alexandria, Va., Sara Criscitelli, Appellate Section, Crim. Div. Dept. of Justice, Washington, D.C., for plaintiff-appellant.

E.L. Brunini, George P. Hewes, III, Charles P. Adams, Jr., Jackson, Miss., Stephen J. Mathes, Bruce W. Kauffman, Philadelphia, Pa., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before, BROWN and RANDALL, *Circuit Judges* and HUNTER*, *District Judge*.

EDWIN F. HUNTER, Jr., *District Judge*:

This case involves a criminal charge that $37,000,000 claimed for increased costs by Litton's nuclear shipbuilding facility in Pascagoula, Mississippi was fraudulent (18 U.S.C. 287). Litton filed a motion to dismiss the indictment, contending that because of delay and prejudice, further prosecution would vio-

* District Judge of the Western District of Louisiana, sitting by designation.

late its Sixth Amendment right to a speedy trial. Litton also urged dismissal on the basis of Rule 48(b) of the Federal Rules of Criminal Procedure. The district court, 557 F. Supp. 568, found a constitutional deprivation of the speedy trial guarantee and granted the motion to dismiss. Alternatively, the district court noted that in the event the delay had been found to be less than constitutional in dimension, it would have exercised its discretion and granted Litton's motion under Rule 48(b).[1] The United States appeals the order of dismissal and requests that the case be remanded for trial.

[1] *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), is, of course, the controlling authority. There, the Supreme Court categorically rejected inflexible approaches and enunciated a balancing test, in which the conduct of both the prosecution and the defendant are weighed. *Id.* at 530-533, 92 S.Ct. at 2191-2193. The balancing test requires the consideration of at least four factors: the length of the delay, the reason for the delay, the timeliness and strength of the defendant's assertion of his right, and the prejudice accruing to the defendant from the delay. No single factor is determinative; these "must be considered together with such other circumstances as may be relevant." 407 U.S. at 533, 92 S.Ct. at 2193.

After carefully considering all the facts, we conclude that, on balance, Litton's Sixth Amendment rights to a speedy trial[2] have not been violated, and that the "unsatisfactory severe remedy of dismissal" was not appropriate in the particular context of this complex case. 407 U.S. at 522, 92 S.Ct. at 2188.

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1. The Speedy Trial Act, 18 U.S.C. 3161, et seq., is applicable only to indictents filed on or after July 1, 1980 (18 U.S.C. 3163(c)). *United States v. Horton*, 646 F.2d 181 (5th Cir. 1981). Nevertheless, Litton did agree on January 25, 1979 to waive its right to a speedy trial under the Act. This waiver occurred after the case was transferred to the Southern District of Mississippi, when the court declined to set a trial date because of Litton's argument that pre-trial motions might be dispositive and that it needed time to prepare for trial.

2. The Sixth Amendment reads in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

BACKGROUND

Various contentions are made in argumentative fashion in explanation of the extensive delay. We find little dispute as to the basic facts as reflected by the record.

(1) In 1968, the Ingalls Nuclear Shipbuilding Division of Litton Systems, Inc. ("Litton") contracted with the United States Navy for the construciton of three nuclear submarines.

(2) Two years after the contract date, Litton filed a claim with the Navy seeking approximately 37 million dollars as a result of increased costs allegedly incurred by late delivery of government-furnished materials. The claim was brought before the Armed Services Board of Contract Appeals (ASBCA), which in April 1976 awarded Litton more than 16 million dollars.[3] This award was pegged on what the government now refers to as the false claim document, upon which the indictment is based.

(3) Litton filed a complaint in the United States Court of Claims seeking to recover the amount awarded. The United States counterclaimed for fraud.[3]

(4) January 17, 1977, Assistant Attorney General Richard Thornburg requested the United States Attorney to present the matter to a grand jury for the purpose of seeking an indictment. Attorney General Griffin Bell approved prosecution of the case on February 7, 1977.

(5) Litton expressed a desire to avoid prosecution and to return the matter to the Board along the lines of a proposal previously made by the government. The government attorney (Dunham) indicated that the prosecutors were now opposed to such a disposition but that he would forward any proposal from Litton to the Department of Justice for review. At Litton's request, the Attorney General, his principal assistants for matters pertaining to criminal prosecutions and fraud, and the United States Attorney and his assistants met with Litton's representa-

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3 On February 3, 1978, the Court of Claims entered a stay pending final resolution of the criminal action.

tives. At the conclusion of this conference the Attorney General found no justification for terminating the prosecution. *United States v. Litton Systems, Inc.*, 573 F.2d 195-198 (4th Cir. 1978).

(6) April 6, 1977. A federal grand jury in Alexandria, Virginia indicted Litton for filing a false claim in violation of 18 U.S.C. 287.

(7) April 11, 1977. Litton entered a plea of not guilty and filed a notice that the case was potentially complex. The court set May 20th for a hearing on pre-trial motions and set trial for June 6, 1977.

(8) May 2, 1977. Litton filed numerous motions, including one for a continuance of the trial date. In support of its motion defendant cited cases for the proposition that "myopic insistence upon expeditiousness" can render a defense ineffective, and that "concern with calendar dispatch should not triumph over the right to a fair trial.

(9) May 17, 1977. The United States filed a formal opposition to defendant's motion for a continuance.

(10) May 25, 1977 (10 days before the government was prepared to begin trial). The district court dismissed the indictment on the grounds of prosecutorial misconduct, concluding that the government had used the implied threat of an indictment in an effort to have Litton submit its claim to the ASBCA for reconsideration.

(11) April 4, 1978. The Fourth Circuit vacated the dismissal order. *United States v. Litton Systems, Inc.*, 573 F.2d 195.

(12) October 2, 1978. The Supreme Court denied Litton's petition for certiorari. 439 U.S. 828, 99 S.Ct. 101, 58 L.Ed.2d 121.

(13) November 28, 1978. The case was remanded to the United States District Court for the Eastern District of Virginia.

(14) December 1, 1978. Litton moved for a change of venue to the Southern District of Mississippi.

(15) December 4, 1978. The United States filed a motion for an order setting a trial date.

(16) December 8, 1978. Litton's motion for a change of venue was granted.

(17) December 20, 1978. The case was docketed in the Southern District of Mississippi. At that time the government was again prepared to go to trial.

(18) January 25, 1979. An untranscribed status conference was held at Jackson, Mississippi (Russell, J.). Mr. Frank W. Dunham, Jr., who was in 1978 the First Assistant United States Attorney for the Eastern District of Virginia, and who was later appointed a Special Assistant United States Attorney for the handling of this case, filed a detailed affidavit in the record. It reveals that at this conference, Litton objected to the government's request that a trial date be set. Litton also represented that it had employed new counsel (see March 7 letter from Brunini to Honorable Dan C. Russell, Jr.) and that it would take more than one year to properly prepare for trial.

(19) January 29, 1979. The district court entered three orders. One "ordered defendant to produce for the government within 60 days any document it intended to use at trial."[4] The second order, upon joint motion, found the case "as a whole, is so unusual and so complex due to the nature of the proceedings that it is unreasonable to expect adequate preparation within the periods of time established by . . . the Speedy Trial Act . . . and . . . the ends of justice served by the entry of this Order outweigh the best interests of the public and the defendant in a speedy trial." Finally, the court entered an order specifying the manner in which motions and objections should be filed. This order noted that the parties were to file their motions within 40 days.

(20) March 7, 1979. Litton filed several motions, including one to dismiss upon statute of limitations and for alleged grand jury violations. It also requested a non-jury trial.

(21) March 19, 1979. The government filed objections to Litton's motions, arguing that with the exception of the motion for a non-jury trial, they restated previous motions denied in

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4. To date, the government has not received a single defense exhibit. (Dunham affidavit)

Virginia. These objections were filed directly with the district judge, together with a letter that closed: "We look forward to receiving further directions from the court as to a hearing date." No directions followed.

(22) December 19, 1979. The parties met and agreed that the prosecution would be stayed during settlement negotiations.

(23) January 23, 1980. Litton's attorney wrote to the United States Attorney confirming that negotiations were ended. The letter stated that "it is understood that the parties' agreement not to take any further action concerning the criminal case during the pendency of negotiations is terminated."

(24) January 13, 1982. Admiral Hyman Rickover wrote to Attorney General William French Smith:

> "Over the past decade I have documented and reported to Defense Department officials numerous examples of false claims submitted by three major shipbuilders, Litton, General Dynamics, and Tenneco. The Navy, after reviewing these reports, forwarded them for investigation by the Justice Department. Today, after years of effort, it appears that the Justice Department is systematically closing down these investigations — either overtly or by inaction — even though the claims are demonstrably false and those who have investigated them have, I believe, recommended to their superiors that indictments be sought. In view of the Justice Department's poor record in this area, and its impact on Government procurement, I am bringing this matter to your attention with my recommendations for corrective action."

(25) February 14, 1982. U.S. Senator William Proxmire, having been alerted by Admiral Rickover's letter, also wrote a letter to the Attorney General requesting a status report on these cases and an explanation of why they had dragged on for so long, and why they are being dropped.[5]

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5. The Rickover and Proxmire letters appear in Appellee's Record Excerpts. We cite them because of Litton's assertion, in both brief and oral argument, that "the government never would have pursued this indictment but for the political pressure generated by Admiral Rickover and Senator Proxmire."

(26) September 23, 1982. The United States filed a formal motion requesting a trial date. The court gave notice to counsel that this motion would be heard on November 4, 1982.

(27) October 29, 1982. Litton filed its motion to dismiss for prejudicial prosecutorial delay. The court noted its intention to hear this motion on December 6, 1982.

(28) November 4, 1982. At the prescheduled hearing, the United States again requested a trial date, arguing that a date was particularly necessary because Litton had raised a speedy trial claim for the first time. Litton argued that the court should defer setting a date for trial, but instead should set a date for a hearing on its motion to dismiss.

At this proceeding, Judge Russell was candid and forthright:

> "As long as cases lie there dormant with the heavy schedule and heavy calendar of this court, we don't go around kicking them up. If the lawyers bring them to us, if the interested parties bring them to us, then we get them disposed of. And so, that may be part of the background in this case. If the urgency is there, it gets tried.
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> * * *
>
> "I'm sorry that it was not disposed of. The lack of hearing from either side, I assumed there was no rush in it."

Judge Russell did not set a trial date, but reset Litton's motion to dismiss for December 20, 1982.

(29) December 8, 1982. Judge Russell at his own suggestion entered a recusal order because of the possibility that he might be a material witness as to the validity of the motion to dismiss.

(30) December 27, 1982. A hearing of Litton's motion to dismiss was heard before Judge Adrian Duplantier in Biloxi, Mississippi.

(31) January 12, 1983. Judgment was rendered, dismissing the indictment.

(32) January 21, 1983. Notice of appeal was given by the United States.

To determine whether there has been a constitutional deprivation of the speedy trial guarantee, we return to the *Barker* balancing process. *See also, Jamerson v. Estelle*, 666 F.2d 241 (5th Cir.1982); *United States v. Greer*, 655 F.2d 51 (5th Cir.1981); *United States v. Hill*, 622 F.2d 900, 908 (5th Cir.1980); *Hill v. Wainwright*, 617 F.2d 375 (5th Cir.1980).

The first factor, the length of delay, serves two roles. First, it must be examined and found to be "presumptively prejudicial." *Barker v. Wingo*, 407 U.S. 514 at 530, 92 S.Ct. 2182 at 2192, 33 L.Ed.2d 101. Here, the parties agree that the delay was presumptively prejudicial and serves as a "triggering mechanism" requiring further analysis. Secondly, we must weigh the length of the delay along with other factors we consider.

Because the period of delay suffices to trigger inquiry, we must address the presumptively prejudicial delay.[6] The Supreme Court said in *Barker v. Wingo*:

> Closely related to the length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.

407 U.S. at 531, 92 S.Ct. at 2193, 33 L.Ed.2d at 117.

A chronological history of these proceedings has been recited. For the sake of clarity we reiterate in order to place the delay issue in proper perspective. The indictment was returned

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6. We reiterate that the Speedy Trial Act is not applicable to this case. The excludability or non-excludability under its terms is largely irrelevant, since its standards differ substantially from the four-factor test established by the Supreme Court for determining whether a defendant's Sixth Amendment right to a speedy trial, as distinguished from statutory rights, has been violated.

in April of 1977. The government requested and was granted a trial date of June 6, 1977. Litton requested a continuance. Ten days before the trial date, the district court granted the motion for dismissal. Ten months later the United States Court of Appeals for the Fourth Circuit vacated the dismissal order. Litton's petition for certiorari was denied and the case was reinstated in November of 1978. The Virginia district court granted Litton's motion to transfer to the Southern District of Mississippi. The Mississippi court called the case for a status conference on January 25, 1979. The government requested a trial date. Litton's new counsel represented that it would probably take at least a year to prepare for trial. Litton filed a battery of motions. A schedule was established for submission of government objections. These objections were filed on March 19, 1979, together with a letter stating:

> "We look forward to receiving further directions from the court as to a hearing date."

In November of 1979, no hearing date having been requested or set, Litton's counsel requested that the parties explore the possibility of a package resolution of this case and the related civil case. On December 17, 1979, counsel met to discuss the proposal. It was agreed that neither side would make any move to alter the status quo of the criminal case. Settlement discussions terminated on January 23, 1980, without agreement. During 1980, Mr. Dunham, the government's lead counsel in this extremely complex litigation, was totally unavailable. Significantly, the government did not affirmatively ask for a continuance or do anything to protract the case. The government simply did not demand a trial date at a time when its uniquely qualified lead counsel was unavailable. Then, too, from December 1980 through March 1981, the government was giving serious consideration as to whether to proceed with this case. Because the original prosecution had been approved by Attorney General Bell, a reconsideration of that initial prosecutive determination by the new Attorney General and his staff appeared both reasonable and prudent. Mr. Dunham communicated his thoughts and conclusions to the Department of Justice in mid-

March, 1981. He carefully analyzed the pros and cons of continuing with the case, not only from the standpoint of the government's interest, but also from the standpoint of fairness to Litton. The decision to proceed was made; the new United States Attorney in Virginia and her staff reviewed the case with the Assistant Attorney General.[7] They decided to assemble a trial team (Dunham affidavit). The government filed a motion requesting a trial date. Five weeks later, and just three days before a scheduled hearing on the motion, Litton moved to dismiss the indictment and asserted its opposition to the setting of a trial date. At the prescheduled November 4, 1982 hearing, Judge Russell deferred setting a trial date. He recused himself because of the possibility that he might be a "material witness" on the issue of delay. Thereafter, Judge Duplantier was assigned to the case.

The two able and experienced trial judges who handled this case candidly and correctly placed the matter in precise perspective. Judge Duplantier noted during argument that "both sides" were perfectly happy with the delay. That's what strikes me from the record, both sides, the Government and Litton." Judge Russell, before recusing himself, put it this way.

> "I want you all to know that we have the heaviest case load in the entire United States, myself, personally, with a thousand and fifteen cases . . . we've had speedy trials down here, we've had a special grand jury that I impaneled for three solid years that has been bringing out indictments, white collar indictments. We've been rather busy in the Southern District of Mississippi.
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> "As long as cases lie there dormant with the heavy schedule and heavy calendar of this court, we don't go around kicking them up. If the lawyers bring them to us, if

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7. The care obviously given the matter by the Justice Department [during this period] is certainly not any indication of bad faith or deliberate delay. See *U.S. v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 1503, fn. 12, 71 L.Ed.2d 696 (1982).

the interested parties bring them to us, then we get them disposed of. And so, that may be part of the background in this case. If the urgency is there, it gets tried.

"I'm sorry that it was not disposed of. The lack of hearing from either side, I assumed there was no rush in it."

[2] There is nothing speedy about a five year delay, and such a delay triggers inquiry, but a review of the appendix and docketed record indicates that Litton rather than the government is responsible for most of the procedural delays in 1977, 1978 and 1979. It would be difficult to charge the prosecution with failure to try the defendant while Litton itself was engaged in seeking legal relief to prohibit such a trial. The government did not affirmatively ask for a continuance or do anything to protract this case. There is no evidence, not even a whisper, that the government deliberately attempted to delay the trial in order to hamper the defendant. Nevertheless, affirmative action in bringing cases to trial is mandated. The government cannot escape that duty on the basis that the delay is for institutional reasons. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192; *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2nd Cir. 1979). When negotiations were terminated in January of 1980, the government should have proceeded to press for an expeditious disposition of Litton's pending motions. Its failure to do so lends some support to defendant's Sixth Amendment claim.

[3] Two counterbalancing factors outweigh this government complacency. Prejudice, if any, is minimal. Prejudice, under the Supreme Court's analysis, embraces three areas of protected interests: oppressive pre-trial incarceration, anxiety and public opprobrium of the accused *and* impairment of the defense. 407 U.S. at 532, 92 S.Ct. at 2193. The first two of these primary interests do not apply to a corporate defendant. The final factor — prejudice to one's defense — is difficult to evaluate qualitatively and quantitatively. It is speculative at best. *United States v. MacDonald*, 435 U.S. 850, 858, 98 S.Ct. 1547, 1551, 56 L.Ed.2d 18 (1978). Litton argues that several key witnesses have died and documents vital to the defense have been lost. The district judge noted the conclusion that compelling Litton to stand

trial without these lost documents is not as clearly prejudicial as is the absence of the deceased witness, Adams.

The government has supplied to Litton copies of all grand jury testimony and intended trial exhibits. Only one of the boxes destroyed by the Navy in 1977 contained material arguably relevant to this case. Its routine destruction before the indictment was returned does not bear on the speedy trial claim. The remaining four boxes of documents currently missing were made available to Litton in 1977, prior to the original trial date of June 1977. They were merely copies of materials furnished the government by Litton.

Only one of the alleged unavailable witnesses was alive in January of 1980. This was David Adams, whose absence the district court found to be substantially prejudicial. Adams had worked for Litton in 1972 and had prepared the manpower charts which Litton filed with the Department of Defense. He was a key government witness before the grand jury, although he was not called by either the government or Litton to testify at the ABSCA proceeding. But, even if Adams could have been available to give exculpatory testimony at Litton's criminal trial, his extensive grand jury testimony, strongly probative of corporate intent, would have been extremely effective impeachment.

The Supreme Court has recognized,

> [B]efore trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative."

United States v. MacDonald I, 435 U.S. 850, 858, 98 S.Ct. 1547, 1551, 56 L.Ed.2d 18 (1978). The record in this case simply does not support a finding that defendant suffered prejudice as a result of the delay.

[4] More important than the absence of prejudice is that Litton definitely did not want to be tried. *Barker* rejected the absolute rule that a defendant who fails to demand a speedy trial forever waives his Sixth Amendment right, but made it abundantly clear that the defendant's assertion of his desire to be tried promptly is to be considered in deciding whether his right has been denied:

> The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

407 U.S. at 531-532, 92 S.Ct. at 2192-2193.

From the inception of this litigation, Litton has sought delay. In effect, it now complains that it did not receive what it never wanted. The district court found that a letter written by Litton's attorney to the United States Attorney's office on January 23, 1980 suffices to constitute an assertion of a Sixth Amendment speedy trial right. Contrary to the district court's assumption, the letter merely recorded the termination of the settlement discussions that had been requested by Litton's counsel in November of 1979. The statement in the letter — "the parties' agreement not to take any further actions concerning the criminal case during the pendency of the settlement negotiations is terminated" — does not by any stretch of the imagination constitute an assertion of a speedy trial demand or claim, let alone a request. Such a reading lacks reality and in our view is clearly erroneous.

The truth is that Litton did not seek a trial date; Litton made an intelligent, counseled speedy trial waiver. The government never requested a continuance or deliberately delayed the prosecution. To the contrary, the government was prepared to prosecute the case in the Eastern District of Virginia in June 1977, and again when the indictment was reinstated in November 1978, and yet again after the case was removed to Mississippi. Litton opposed prompt trials on each occasion and repeatedly expressed a need for lengthy continuances to prepare for trial. Indeed, it continued in November 1982 to oppose the setting of a trial date.

[5] Our review of constitutional considerations pursuant to *Barker* criteria convinces us that Litton was not denied a Sixth Amendment speedy trial. Remarkably applicable here is the Supreme Court's closing paragraph:

> We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.

407 U.S. at 536, 92 S.Ct. at 2195. There are no such "extraordinary circumstances" in this case, and to so hold would be a distortion and abuse of the right to a speedy trial under the Sixth Amendment, which was never intended to protect those who do everything in their power to delay or defeat the holding of a trial as long as possible.

The district court, on a separate and alternative basis, dismissed the indictment pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure.[8]

The record demonstrates that the government never requested a continuance or deliberately delayed the prosecution. There is no serious suggestion of prosecutorial bad faith. The delays occasioned by Litton's various legal initiatives in 1977, 1978 and 1979 cannot be attributed to the prosecution. There was no constitutional deprivation, and peremptory dismissal without forewarning, followed by a long period of acquiescence in the delay, was not appropriate.

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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8. This rule is not confined to constitutional violations, but also embraces the inherent power to dismiss for want of prosecution. *United States v. Novelli*, 544 F.2d 800, 803 (5th Cir.1977). The rule provides in pertinent part:

> "If there is unnecessary delay . . . in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

CRIMINAL ACTION

v.

NO. 378-0031(R)

LITTON SYSTEMS, INC., d/b/a
INGALLS NUCLEAR SHIPBUILDING
DIVISION

The Motion to Dismiss the Indictment for Inexcusable and Prejudicial Prosecutorial Delay and Loss and Destruction of Exculpatory Evidence filed by defendant was heard on December 20, 1982, and was taken under submission.

The motion is granted; the indictment is dismissed. Written reasons will be assigned.

Dated: December 23, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

CRIMINAL ACTION

v.

NO. 578-0031(R)

LITTON SYSTEMS, INC., d/b/a
INGALLS NUCLEAR SHIPBUILDING
DIVISION

JUDGMENT

The court having, on December 23, 1982, granted the motion of defendant to dismiss the indictment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant LITTON SYSTEMS, INC., dismissing the indictment.

United States District Judge

January 7, 1983

UNITED STATES OF AMERICA,

Plaintiff

v.

LITTON SYSTEMS, INC. d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,

Defendants

Crim. No. S78-0031(R).

United States District Court,
S.D. Mississippi, S.D.

March 1, 1983

REASONS FOR JUDGMENT

DUPLANTIER, *District Judge*

Litton Systems, Inc. (Litton), indicted in April of 1977 for allegedly making a false claim against the United States government (18 U.S.C. §287),[1] has filed a motion to dismiss the indictment because of "inexcusable and prejudicial prosecutorial delay" and the "loss and destruction of exculpatory evidence." Litton contends that, considering the delay and resulting prejudice, further prosecution would violate its Sixth Amendment right to a speedy trial. Litton also urges dismissal on the basis of Rule 48(b) of the Federal Rules of Criminal Procedure.[2] For the

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1. 18 U.S.C. §287 provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. Defendant does not suggest that the indictment should be dismissed on the basis of the Speedy Trial Act, 18 U.S.C. §3161, *et seq*. The sanction of dismissal is applicable only to indictments filed on or after July 1, 1980. 18 U.S.C. §3163(c); *United States* v. *Horton*, 646 F.2d 181 (5th Cir. 1981).

following reasons, the motion to dismiss the indictment was granted.

In 1968, the Ingalls Nuclear Shipbuilding Division of Litton entered into a contract with the United States Navy for the construction of three nuclear submarines. Prior to the awarding of the contract to defendant, the Navy conducted an investigation to determine the manpower and facilities capability of the Ingalls Shipyard; the documents accumulated in this investigation are referred to as "source selection documents."

Over two years after the contract date, Litton filed a claim with the Navy, seeking compensation for increased contract costs which Litton asserted were made necessary by actions of the government. After this claim was made by Litton, the Navy conducted another investigation, this time gathering "production audit documents" which defendant had relied on in making its request for increased compensation. The claim was brought before the Armed Services Board of Contract Appeals (ASBCA), and in early 1976, after hearing sixty-nine days of testimony, the board awarded Litton over sixteen million dollars.

Before the ASBCA ruling was handed down, the government began a criminal investigation into allegations of fraud relating to the claim made by Litton. Evidence was presented to three grand juries, one of which expired after 18 months of investigating only Ingalls Shipyard without returning an indictment. For six days in April of 1977, a fourth grand jury heard a summary by two FBI agents of the evidence before the prior grand juries and returned a one-count indictment against the corporate defendant only. All of these grand juries were empanelled in the Eastern District of Virginia.

Shortly after the indictment was handed down, the United States District Court granted a motion to dismiss the indictment on the ground of prosecutorial misconduct during the grand jury proceedings. Early in 1978, the United States Court of Appeals for the Fourth Circuit reversed and remanded the case for trial. 573 F.2d 195. Later that year, the district judge granted a defense motion for change of venue and transferred the case to the Southern District of Mississippi, where the Ingalls Shipyard is located.

A status conference was held on January 25, 1979; the parties jointly agreed that the case need not be set for trial within the 60 day period[3] provided in the Speedy Trial Act (18 U.S.C. §3161(c)(1) and (e)). An order issued after the conference allowed the parties forty days to file motions, and stated that if a party objected to a motion being heard, on the basis that the motion had already been decided by the district court in the Eastern District of Virginia, then a hearing was to be set on the "objection" prior to any substantive action on the motion itself. By March 19, 1979, Litton had filed several motions, and the government had filed objections, seeking the dismissal of all but one of the motions. A hearing on the objections was never set by the government; in fact, the government did not take any further action toward prosecution for over three and one-half years, until September 22, 1982, when the government filed a motion to set a trial date.

During the intervening period, the only activity which could be construed as in furtherance of the prosecution was a meeting on December 17, 1979, provoked by defendant's attorney, to discuss possible settlement. The settlement negotiations were short-lived; on Janaury 23, 1980, Litton's attorney wrote to the U.S. Attorney, confirming that negotiations were ended. The letter stated that "[i]t is understood that the parties' agreement not to take any further actions concerning the criminal case during the pendency of settlement negotiations is terminated."

I. Speedy Trial under the Sixth Amendment

[1] The starting point for any analysis of an an alleged violation of the Sixth Amendment right to a speedy trial is the United States Supreme Court decision of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). *Barker* sets forth a four-part "balancing test" to be applied on an *ad hoc* basis whenever an issue concerning a breach of the speedy trial guarantee

3. The Speedy Trial Act has since been amended so that the 60 day period referred to is now 70 days. 18 U.S.C. §3161(c)(1) and (e).

is raised. *Id.* at 530, 92 S.Ct. at 2191. The United States Court of Appeals for the Fifth Circuit recently discussed the *Barker* test and its factors as follows:

> *Barker v. Wingo* provides the tetrad standard against which we must measure the elusive speedy trial perquisite: (1) duration; (2) reason for the delay; (3) defendant's assertion of the right; and (4) prejudice caused by the delay. No one consideration is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial . . . they are related factors and must be considered together with such other circumstances as may be relevant." 407 U.S. at 533, 92 S.Ct. at 2193.

United States v. Greer, 655 F.2d 51, 52 (5th Cir. 1981). *See also Jamerson v. Estelle*, 666 F.2d 241 (5th Cir. 1982); *United States v. Herman*, 576 F.2d 1139 (5th Cir. 1978); *United States v. Edwards*, 577 F.2d 883 (5th Cir. 1977), *cert. denied*, 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976); *Arrant v. Wainwright*, 468 F.2d 677 (5th Cir. 1972).

[2] Considering these four related factors together with the other circumstances relevant to this prosecution, we conclude that Litton's right to a speedy trial has been violated and that the indictment should be dismissed.

(A) *Length of Delay*

[3] The Sixth Amendment right to a speedy trial attaches at the date of arrest or, in this case, indictment, and runs until the commencement of trial. *United States v. Gonzalez*, 671 F.2d 441, 444 (11th cir. 1982). Because the government could not proceed to trial until the case was transferred to Mississippi, we consider the delay period as commencing then rather than at indictment. The transfer to this district was in late 1978; the government first filed a motion to set a trial date on September 22, 1982, over three and one-half years later. The government argues, and correctly so, that the length of delay sufficient to warrant inquiry into the remaining *Barker* factors is related to the

complexity of the case; however, forty-five months is an extraordinary delay by any standard. This conclusion is mandated by the Fifth Circuit's determination in *United States v. Avalos*, *supra*, that a 15 month delay in a complex conspiracy case "triggered" the *Barker* test. Moreover, the government had spent years prior to indictment compiling evidence against Litton; by the date of indictment it should have been prepared to proceed to trial promptly.

(B) *Reasons for Delay*

We now consider the government's asserted justifications, or lack thereof, for the lengthy delay. Three general categories of reasons for delay have been suggested by the Fifth Circuit, each assigned a different weight of culpability: deliberate delay, negligent delay and justified delay. *United States v. Avalos*, *supra; Turner v. Estelle*, 515 F.2d 853 (5th Cir. 1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976).

We classify the period between indictment and March 19, 1979, as justified delay. It was during that interval that defendant's motion to dismiss the indictment for prosecutorial misconduct before the grand jury was granted by the district court, the district court's decision was reversed by the Court of Appeals, and the case was remanded to the district court in Virginia and then transferred to this district in Mississippi. The date March 19, 1979, is significant because it was at that point that all motions and objections thereto had been filed. It was then the government's obligation to take steps to bring the case to trial.[4]

4. On March 29, 1979, the government sent a letter to the trial judge stating that it had filed its objections to Litton's motions, and it "look[ed] forward to receiving further directions from the court as to a hearing date." It is well recognized that the primary responsibility for moving a criminal case to trial lies with the prosecution. *Barker v. Wingo*, *supra*, 407 U.S. at 527, 92 S.Ct. at 2190. Even in those cases in which delay is related to actions taken by the court, and this is *not* such a case, the government still has a responsibility to minimize the delay. *United States v. Vispi*, 545 F.2d 328 (2d Cir.1976); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368 (2d Cir.1979); *United States v. Jones*, 524 F.2d 834 (D.C.Cir.1975). All that the government needed to do in this case was to file a motion to set a hearing. Instead, the government took no action for well over three years.

Although this period can be justified, the government, cognizant of the amount of time that already passed in this "justified period", should have moved all the more expeditiously thereafter. Both lengthy prior periods, the first between the alleged criminal activity and indictment, and the second between indictment and March 19, 1979, amplify the unreasonableness of any subsequent periods of unjustified delay.

From March 19, 1979, until 42 months later, September 22, 1982, when the motion to set a trial date was filed, the government took no action whatsoever. The court's other commitments would, of necessity, require several additional months of delay between the motion to set a trial date and the commencement of trial, especially considering the anticipated length of trial.[5] Thus the period of prosecutive inaction is more appropriately estimated at four years. As noted earlier, the constitutional right to a speedy trial attaches at indictment and runs until *trial*, not merely until the date on which the government moves to set a trial date. *United States v. Gonzales, supra*.

The government has offered various explanations for several segments of this four year period. It would serve no useful purpose to discuss all of these in detail, but some discussion is necessary to demonstrate that the government has merely explained, but not justified, the long delay.

The government's primary explanations for the delay relate to internal problems within the Department of Justice. In particular, an attorney whom the government considered to be an essential part of its trial team had gone into private practice in 1978 and had difficulty in arranging his schedule to take part in the Litton litigation. A related "problem" was that serious discussions were being carried on within the Department of Justice as to whether or not the prosecution of Litton should be pursued. Such explanations of course do not justify the deprivation of the right to speedy trial, especially since Litton was unaware of the government's "problems." As far as Litton knew, or any other reasonable defendant would have believed, the case had

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5. Counsel estimated that the duration of trial would be between three and six months.

been abandoned by the United States. Certainly the record supports the conclusion that the government had abandoned the prosecution and decided to resurrect it shortly before the motion to set a trial date.[6]

The court's impression that the government's explanations were not excuses nor "justified reasons for delay" was confirmed at oral argument by the government's admission that in fact no action was taken because the prosecution was satisfied with the status quo and with not proceeding to trial.[7]

Additionally, while under certain circumstances complexity may justify a longer than normal delay, the government nowhere suggests that the reason for the delay is the complexity of this case. Admittedly, the government's desire to have a former government attorney return from private practice to try the case is related to its complexity. However, the Justice Department never requested that attorney to rearrange his commitments in private practice to accommodate to a speedy trial of Litton. At any rate, as already noted, the government admitted that the

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6. The government's decision to reassemble its trial team was not made until May 24, 1982, and not announced until September 22, 1982, when the motion to set trial was filed. There is strong evidence that the May 24th decision was made only after pressure upon the Justice Department from prominent political figures. A letter dated January 13, 1982, was sent to Attorney General William French Smith by Admiral Hyman Rickover, complaining that the prosecution of Litton had "lain dormant" and that "the Justice Department is systematically closing down these investigations." Admiral Rickover notes the obvious: "[w]ith the passage of time, the likelihood of prosecution becomes more remote . . ." Another letter, this one by Senator William Proxmire dated February 24, 1982, requests that Attorney General Smith provide [Proxmire] with a status report of [the Litton case] and together with an explanation of why [it has] dragged on for so long and why [it is] being dropped." The fact that it appeared to Senator Proxmire and Admiral Rickover that the Litton prosecution was quite likely abandoned demonstrates that Litton's similar belief was justified.

7. Frank W. Dunham, Jr., Special United States Attorney, Eastern District of Virginia, in responding to a suggestion by the court, stated:

> MR. DUNHAM: Your Honor, that impression that you just stated . . . , I believe more succinctly states the proposition than I could put it. Both sides were perfectly satisfied with the fact that nothing was moving forward.

true reason for the delay was that it was "perfectly satisfied with the fact that nothing was moving forward." That the long delay was deliberate can be determined entirely from the following colloquy during oral argument, between the government's special prosecutor and the court.

> THE COURT: Well, you just got finished telling me . . . that all the Government had to do was ask you and you would have been "Johnny on the spot".
>
> MR. DUNHAM: I said that I would have attempted—I just told you, Your Honor, I said I would have attempted to organize my schedule in such a way that I could have accommodated them.
>
> THE COURT: I understand that.
>
> MR. DUNHAM: And I believe I made myself clear, Your Honor, that it is not something that I had complete control over. I had Judges in the District of Columbia and Eastern District of Virginia to deal with—
>
> THE COURT: Nobody suggested that you had that. What I'm saying is that no attempt ever was made to mesh those schedules, and you have told me that, and I understand that. The Government never asked you to accommodate to an earlier trial date in this matter.
>
> MR. DUNHAM: That's true Your Honor.
>
> THE COURT: It sat still and said we're satisfied the way things are going.
>
> MR. DUNHAM: That's exactly—Now that's—
>
> THE COURT: That's it.
>
> MR. DUNHAM: I don't quibble with that at all, Your Honor. That's correct.
>
> THE COURT: Now the problem is, you know, how does that implicate the Defendant's rights under the constitution.

A final justification offered by the government for the four year delay is that during that period the government and Litton entered into settlement negotiations, and apparently struck an

understanding that the criminal prosecution would not move forward during the ongoing discussions. Review of the record shows that the government is correct, that discussions did occur at the request of the defendant for exactly five weeks[8] of the four year period. The parties met on December 17, 1979, agreeing that prosecution would be stayed during negotiations; the talks broke off on January 23, 1980. On that date a Litton attorney notified the government by letter that their understanding concerning a stay of the criminal prosecution was terminated. Because the settlement negotiations involve only an insigificant part of a substantial period of delay, the unjustified nature of the total delay is unaffected. Even if the negotiations had occurred over a longer period, the time spent in settlement discussions should weigh against the government. Settlement negotiations can be analogized to the process of plea bargaining, the period for which has been held to weigh against the government. "[I]f the government wishes to bargain . . ., it may but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay." *United States v. Carini*, 562 F.2d 144, 149 (2d Cir.1977). *See also United States v. Roberts*, 515 F.2d 642 (2d Cir.1975).

Clearly, the reasons for the delay are not "justified"; indeed, we categorize the delay as "deliberate", not merely "negligent." *Turner v. Estelle*, *supra*; *United States v. Avalos*, *supra*. Neat categorizations of previous decisions do not apply to the present extraordinary situation in which the government admits that an excessive period of inaction was the result of governmen-

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8. During this period of negotiations, defendant's attorney sent a lengthy letter to a government attorney concerning specifics of settlement possibilities. The letter includes a comment that "[s]taleness is to Litton's benefit." If by referring to this letter, the government implies that its delay was justified, because it appeared that Litton was in no hurry to complete the litigation, the argument is rejected. Taken in the context of the entire letter, Litton was simply trying to persuade the government that settlement would be to the government's advantage. In any event, the letter sent by Litton's attorney less than three weeks later terminating any understanding that the parties would take no further action certainly sufficed to reinstate, if necessary, Litton's speedy trial rights.

tal complacency. Surely such a conscious, intentional decision not to proceed presents more than a negligent or neutral reason for delay. The decision not to seek a trial date for nearly four years was deliberate[9], and, thus, weighs very heavily against the government.

(C) *Assertion of the Speedy Trial Right*

Not surprisingly, the Supreme Court in *Barker v. Wingo*, *supra*, 407 U.S. at 527, 92 S.Ct. at 2190, placed the responsibility for bringing a criminal prosecution to trial squarely upon the shoulders of the prosecution:

> A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

Although rarely will a defendant be anxious to have himself brought to trial, the Court nevertheless concluded that a consideration to be weighed along with the other factors was whether defendant had asserted the speedy trial right.

Under the unusual circumstances of this case, Litton's conduct was sufficient to constitute its assertion of its Sixth Amendment speedy trial right. If nothing else, the letter to the prosecutor dated January 23, 1980, in which the defendant's counsel stated clearly that the agreement by which the government would not pursue the criminal prosecution during the pendency of settlement negotiations was terminated, put the government on notice that thereafter defendant intended to assert whatever right it had *quo ad* prosecutive delays. There is no other reason for the statement in the letter. It is significant that this letter was sent early in the four year period of unexcused government inac-

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9. Although the government's delay was not deliberate in the sense that it was motivated by a desire to hamper Litton's defense, delaying the decision to revive the prosecution until May of 1982, and failing to advise Litton for an additional four months thereafter, had the same effect.

tion. We conclude that defendant's speedy trial right was timely urged. *See generally United States v. Greer, supra; United States v. Herman, supra.*

Once settlement negotiations between the government and Litton ceased in January of 1980, there was no further contact between the parties until 32 months later, when the government filed a motion to set a trial date. The government conceded in its memorandum that during a lengthy period it seriously considered abandoning the prosecution.

Certainly, it was reasonable for Litton to have concluded that the indictment was not being pursued. Under the circumstances, Litton should not be charged with the responsibility of taking any further action to bring the criminal charge against it to trial.

The government argues that Litton's agreement on January 25, 1979, that the case need not be set for trial within the Speedy Trial Act 60-day period, somehow waived Litton's right to assert a Sixth Amendment violation. Assuming that this agreement did in fact act as a continuing waiver of the defendant's Speedy Trial Act rights, which is very doubtful,[10] it certainly did not affect Litton's constitutional interests. *See* 18 U.S.C. §3173.[11] As the Supreme Court has often stated, the waiver of a constitutional right is not to be inferred:

> The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937), and they should "not presume acquiescence in the

10. *See United States v. DeLongchamps*, 679 F.2d 217 (11th Cir. 1982), a recent case indulging every reasonable presumption against waiver of a Speedy Trial Act right, and holding that if a waiver is found, the extent of the waiver should be interpreted narrowly.

11. 18 U.S.C. §3173 provides:

> No provision of this chapter [18 U.S.C. §§3161 et seq.] shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

loss of fundamental rights," *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937).

Barker v. Wingo, *supra*, 407 U.S. at 525-6, 92 S.Ct. at 2189-2190.

Litton did not waive the protection of the Sixth Amendment, but instead asserted its right to a speedy trial, at least as of January, 1980.

(D) *Prejudice Caused By The Delay*

In *United States v. Avalos*, *supra*, at 1116, the Fifth Circuit enumerated three principles applicable to the speedy trial factor of "prejudice":

> First, a showing of actual prejudice to the conduct of the defense will weigh heavily against the government and may lead to dismissing the indictment even when the three remaining factors are not weighted heavily in favor of the accused. When a showing of actual prejudice is conjoined with a lengthy delay by the government that is unexplained or deliberate, then a defendant states a compelling case for denial of speedy trial. *See Arrant v. Wainwright*, *supra*, 468 F.2d at 683.
>
> Second, where the government's lengthy delay is unexcused or purposeful, in the sense of a deliberate delay to gain tactical advantage, the government's delay is prima facie prejudicial. The government will have the burden of demonstrating that the defendant has not been prejudiced by the delay. *See Murray v. Wainwright*, *supra*, 450 F.2d at 471.
>
> Third, when the three other elements of *Barker's* weighing and balancing test are heavily weighed in favor of the accused, the accused need demonstrate no prejudice at all. "Prejudice — either actual or presumed — becomes totally irrelevant." *Hoskins v. Wainwright*, *supra*, 485 F.2d at 1192. *See Prince v. State of Alabama*, *supra*, 507 F.2d at 706-07.

There can be no doubt that the first two elements of *Barker's* "weighing and balancing test", duration and reason for the delay, are very "heavily weighted" in favor of the accused. While there is no evidence that the delay was "purposeful, in the sense of a deliberate delay to gain tactical advantage" the delay was unexcused, and this suffices under *Avalos* to place upon the government the burden of "demonstrating the lack of prejudice to defendant." *Id.* The government has not met this burden.

Alternatively, we conclude that the third principle of *Avalos* is applicable and that therefore prejudice is "totally irrelevant." While the third *Barker v. Wingo* factor, "assertion of the right" is a closer call than the first two (duration and reason for delay), it also is "weighted" in favor of the accused. We hold that the total "weight" of the three factors is indeed sufficiently "heavy" in favor of the accused to make applicable the third principle of *Avalos* and render prejudice irrelevant.

Finally, for the sake of completeness, we hold that Litton has demonstrated "actual prejudice to the conduct of the defense." *Id.*

The three types of prejudice that a speedy trial seeks to prevent were outlined by the Supreme Court in *Barker v. Wingo*, *supra*, 407 U.S. at 532, 92 S.Ct. at 2193:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Only a corporate defendant is indicted; hence the first of these interests is not a concern here. The second, relating to "anxiety", is a consideration only in that several Litton personnel have been implicated through the government's answer to a request for a bill of particulars. Although the *Barker* test was not designed to protect non-defendants, the Court stressed in *Barker* that its list of four factors was not exclusive, and, there-

fore, the interests of collaterally implicated individuals in a speedy trial should not be totally overlooked.

Litton emphasizes prejudice on the basis of the "most serious" of the speedy trial interests of a defendant, impairment of its defense. In particular, Litton argues that several key witnesses have died during the unexcused delay, and documents vital to the defense have been lost by the government. Before examining these complaints, we note the seeming truism that the risk of prejudice is great in a complex case based on old facts. The government agrees that the present case involves an intricate set of circumstances based upon facts which occurred over fifteen years ago. Even if much of the delay in this case is viewed as justified, the fact that long periods of justified delay have occurred simply increases the possibility of serious prejudice arising during periods of unjustified delay.

The defendant makes a strong argument with regard to the importance of one of the deceased witnesses, David Adams, who died during the period of deliberate governmental delay, in May of 1980. The government alleges that certain manpower charts were submitted to support Litton's false claim. These charts were prepared by Mr. Adams. The government does not deny the importance of Mr. Adams, but asserts that he was a government witness and his testimony is preserved by grand jury transcripts. Not surprisingly, defendant is not comforted by that explanation. The fact that such testimony, elicited without cross-examination, without representation by counsel, and without regard for the rules of evidence, may be admitted at trial compounds the problem of potential prejudice. It is the defendant, not the government, which is prejudiced by the unavailability of the witness. Moreover, defendant stresses that the now deceased witness would have testified as to a number of matters favorable to defendant, not covered in his grand jury testimony. An affidavit of one of the attorneys familiar with the situation provides specifics as to that exculpatory testimony.

Several boxes of exculpatory documents, of two different categories, have been lost while in the government's possession. The production audit documents lost were those materials accumulated by the Navy in 1970 when Litton filed its claim against

the government. The missing source selection documents are the government's own documents which were the product of the Navy's 1968, pre-contract investigation of the Ingalls Shipyard's capabilities. The conclusion that compelling Litton to stand trial without these lost documents would be substantially prejudicial is not as clear as with respect to the deceased witness, Adams. However, considering all the circumstances, prejudice can reasonably be inferred.

While denying the existence of prejudice, the government argues that even if prejudice is apparent, the indictment should not be dismissed pre-trial, because the extent of the prejudice cannot be determined until the court has heard the complete factual development. Although in many cases it may be difficult to judge adequately the validity of a speedy trial complaint of prejudice prior to trial, "an accused who does successfully establish a speedy trial claim before trial will not be tried." *United States v. MacDonald*, 435 U.S. 850, 861 n.8, 98 S.Ct. 1547, 1553 n. 8, 56 L.Ed.2d 18 (1978). *See also United States v. Roberts*, *supra*; *United States v. Salzmann*, 417 F.Supp. 1139 (E.D.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir.1976). Even if pre-trial dismissal is unusual, it is particularly appropriate in this most unusual case. The expected length of this trial is three to six months. Proceeding with trial under the circumstances of this prosecution is impractical, considering the immense expense, both public and private, that trial would entail. Delaying a decision as to a speedy trial violation until after trial is also undesirable from the standpoint of judicial economy.

II. Speedy Trial under Rule 48(b) of the Federal Rules of Criminal Procedure

The secondary ground for dismissal raised by defendant is based on Rule 48(b) of the Federal Rules of Criminal Procedure, which provides as follows:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial,

the court may dismiss the indictment, information or complaint.

The extent of a district judge's discretion under this rule is unresolved in the Fifth Circuit, but there is no question that dismissal pursuant to Rule 48(b) is required in the event of a constitutional deprivation of the Sixth Amendment right to speedy trial. *United States v. Hill*, 622 F.2d 900 (5th Cir.1980); *United States v. Noll*, 600 F.2d 1123 (5th Cir.1979); *United States v. Gorthy*, 550 F.2d 1051 (5th Cir.), *cert. denied*, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977). Some circuits have interpreted Rule 48(b) as giving a district court the authority to dismiss in situations not involving a constitutional violation; the rule is a restatement of a court's inherent power to dismiss for want of prosecution. *See, e.g., United States v. Dreyer*, 533 F.2d 112 (3d Cir.1976); *United States v. Correia*, 531 F.2d 1095 (1st Cir.1976); Notes of the Advisory Committee on Fed.R.Crim.P. 48(b). In deciding whether dismissal is justified under this rule, a court should consider the same factors relevant to a constitutional decision, as outlined in *Barker v. Wingo*, *supra*, but impose a stricter standard. 3A C. Wright, *Federal Practice and Procedure*, §814 (1982). Dismissal may be with or without prejudice. *Id.*

The government disputes that dismissal would be proper here, arguing that the rule should be exercised only after the government has been forewarned of the sanction. The government argues that this view of the rule has been adopted in the Seventh and the Ninth Circuits: *United States v. Clay*, 481 F.2d 133 (7th Cir.1973); and *United States v. Simmons*, 536 F.2d 827 (9th Cir.1976). In actuality, the *Clay* decision, relied on in *Simmons*, held that "[a]bsent such forewarning, or some other showing justifying an exercise of discretion . . . it was error to dismiss the indictment simply because unnecessary delay of approximately eight months occurred . . ." 481 F.2d at 138. *Clay* would not require forewarning here, because "there is some other showing justifying an exercise of discretion" — the excessive period of unjustifiable delay. In any event, even if *Clay*, involving an eight month delay, and *Simmons*, four months, did

support the government's position, those cases would hardly be persuasive in this situation where the delay approaches four years.

Obviously, because this court has already found a constitutional deprivation of the speedy trial guarantee, a 48(b) dismissal is mandated. In the event the delay in the present case had been found to have been less than constitutional in dimension, this court would have exercised its discretion and granted Litton's motion with prejudice to the government. The length of delay and the reasons therefor are, at the least, intolerable, if not unconstitutional.

III. Conclusion

We would ordinarily avoid the Sixth Amendment issue and base the decision only on the non-constitutional ground, Rule 48(b). However, because the considerations in applying either Rule 48(b) or the Sixth Amendment right to speedy trial are so similar, and because the parameters of the Rule are not clearly defined, we dismiss the indictment on both grounds.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
ALBERT V. BRYAN, JR., DISTRICT JUDGE.

Argued February 7, 1978 Decided April 4, 1978

Before WINTER, BUTZNER and RUSSELL, *Circuit Judges*

William B. Cummings, United States Attorney (Frank W. Dunham, Jr., Assistant United States Attorney, Joseph A. Fisher, III, Assistant United States Attorney and Sara S. Beale and Elliott Schulder, Department of Justice on brief) for appellant; Bruce W. Kauffman (David H. Pittinsky, Stephen J. Mathes, Lawrence D. Berger, Dilworth, Paxson, Kalish, Levy & Kauffman; W. W. Koontz, John S. Stump, Boothe, Prichard & Dudley on brief) for appellee.

BUTZNER, *Circuit Judge:*

The United States appeals from an order of the district court dismissing a one count indictment against Litton Systems, Inc., because of prosecutorial misconduct during pre-indictment negotiations between the parties. We vacate the order of dismissal and remand the case for further proceedings.

I

In 1972 the Ingalls Nuclear Shipbuilding Division of Litton Systems, Inc., filed a claim with the Navy for approximately $30 million in connection with a contract to construct nuclear submarines. The company appealed an adverse decision by the Navy contracting officer to the Armed Services Board of Contract Appeals, which in April, 1976, awarded Litton more than $16 million. Both parties agreed not to ask for reconsideration of the award.

In March, 1975, after the Board had concluded its hearings but before it announced its decision, the district court impaneled a federal grand jury to investigate Litton's claims against the Navy. At a conference with the assistant United States attorneys handling the investigation, Vincent J. Fuller, counsel for Litton, inquired whether there might be an alternative to the criminal investigation. One of the assistants responded that the government did not presently have enough evidence to make such a decision. Fuller also asked for advance notice if they decided to seek an indictment because he wanted a chance to attempt to dissuade the government from proceeding.

Toward the end of the grand jury's term, the government lawyers concluded that although the falsity of Litton's claims could be proved, the evidence of criminal intent was insufficient to establish guilt beyond a reasonable doubt. They therefore decided to let the term expire

without seeking an indictment and to continue the investigation, exploring several promising leads that would enable them to prosecute the corporation rather than individual employees. About the same time, an attorney paid by Litton to represent employees before the grand jury suggested to Frank W. Dunham, Jr., the Assistant United States Attorney in charge of the investigation, that someone should talk to Fuller about alternatives to criminal prosecution. Dunham knew that this attorney communicated frequently with Litton's counsel and, recalling Fuller's earlier requests, he decided to confer with Fuller.

On September 9, 1976, Dunham explained to Fuller that the government had evidence that Litton's claim was false but that it had not yet found sufficient proof of willfulness and criminal intent. He told Fuller that no indictment would be returned but that the investigation would have to continue. Dunham said that he saw a possible way to resolve the controversy but was "reluctant to discuss it without assurances first being made that the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question." Fuller agreed to this stipulation, encouraged Dunham to proceed, and said that he would terminate the talks any time he deemed them inappropriate or improper. Dunham then proposed that:

> A. Both Litton and the Navy would petition to reopen the [Armed Services Board of Contract Appeals] proceeding;
>
> B. Both Litton and the Navy would join in application to the Court for a [Federal Rule of Criminal Procedure] 6(e) Order to permit inspection by Litton and the Navy of grand jury materials for use by both parties in the reopened [Board] proceedings;

> C. The Government would not assert fraud as a defense in the Court of Claims to any final judgment for Litton in the [Board] nor would it initiate any civil fraud suits;
>
> D. The criminal investigation would be terminated.

Elaborating on this outline, Dunham emphasized that, upon hearing whatever additional evidence either side wanted to introduce, the Board could adjust its award up or down or let it stand.

Fuller found the proposal reasonable, describing it as a "breath of fresh air," and a few days later he advised Dunham that Litton was interested in discussing it. At a second meeting, Dunham disclosed the evidence of the falsity of Litton's claim, and the parties discussed the mechanics of reopening the proceeding before the Board and getting the corporate and governmental approvals necessary to implement the plan. Two days later, however, Glen McDaniel, the chairman of Litton's executive board, who had not conferred with the government attorneys, met with Deputy Attorney General Harold R. Tyler, Jr., complaining that Litton was being threatened with indictment if it refused to reopen the Board proceedings. Fuller, upon learning of this complaint from Dunham, agreed that it violated their understanding concerning discussion of the proposal and offered to advise the Deputy Attorney General of this. After inquiring into the settlement negotiations, the Deputy Attorney General wrote Litton that he found nothing improper in them. He suggested that Litton's lawyers contact the government attorneys if further negotiations were desired.[1] At Litton's

1. The Deputy Attorney General's letter of October 7, 1976, to McDaniel stated:

> This letter is in response to the concerns you raised at our meeting of September 15, 1976. (Cont'd. on p. A17.)

request, the parties again conferred, but on November 1, 1976, Litton rejected the proposal.

The government's investigation continued throughout the final months of 1976. On January 17, 1977, Assistant Attorney General Richard Thornburg requested the United States Attorney to present the matter to a new grand jury for the purpose of seeking an indictment. Attorney General Griffin Bell approved prosecution of the case on February 7, 1977.

Dunham honored Fuller's request and advised him of the decision to indict. In response, Litton expressed a desire to avoid prosecution and to return the matter to the Board along the lines of the government's proposal. Dunham indicated that the prosecutors were now opposed to such a disposition but that he would forward any proposal from Litton to the Department of Justice for review. At Litton's request, the Attorney General, his principal assistants for matters pertaining to criminal prosecutions and fraud, and the United States Attorney and his assistants met with Fuller, McDaniel, and two members of Litton's board of directors. At the conclusion of this conference the Attorney General found no justification for terminating the

1. (Cont'd.)

I have met with those in the Department of Justice who have been handling the investigation of Litton Industries. I see no compelling evidence that the settlement discussions entered into between Litton and the Government were anything other than good faith attempts, on both sides, to explore freely all possible avenues by which this investigation could be brought to a conclusion satisfactory to all concerned. The Department lawyers involved in these talks, I am told, made clear to Litton's lawyer, Mr. Fuller, at the outset of the discussions that they do not possess authority to settle without approval from their superiors in the Department; this is in fact the case in all such settlement discussions.

I would suggest that your outside counsel, Mr. Fuller, contact our Department attorneys with a view to resuming these exploratory discussions, so that this matter may again proceed on course.

prosecution. The next day the grand jury returned the indictment. Litton, represented by new counsel, subsequently moved to dismiss it.

The district court granted Litton's motion. It found that the government's proposal constituted an implied threat of indictment designed to coerce Litton into giving up its award and that, when Litton refused, the government retaliated by obtaining the indictment. The district court acknowledged that the bargain could arguably have been justified if the government had made its proposal after indictment. Nevertheless, it held that the government's use of the grand jury as a bargaining tool to upset the Board's award violated Litton's substantive due process right to have the finality of its civil claim attacked only within the statutory and regulatory schemes established for that purpose. Although Fuller did not testify, the court discounted his waiver of objections on the ground that the situation was so inherently coercive that no prudent attorney could have refused to entertain the proposal.

II

This case is governed by the principles expressed in Bordenkircher v. Hayes, 98 S. Ct. 663 (1978). The district judge, it should be noted, did not have the benefit of that opinion, for it was published after he granted Litton's motion to dismiss the indictment. Hayes, a state prisoner, had been indicted for uttering a forged check. During plea negotiations, the prosecutor offered to recommend a five year sentence if Hayes would plead guilty; if Hayes would not plead guilty, the prosecutor threatened to indict him as a recidivist, for which the mandatory penalty was life imprisonment. Hayes refused the offer, and the prosecutor obtained the second indictment. On his plea of not

guilty, Hayes was convicted of the charges in both indictments and sentenced to imprisonment for life.

Hayes—like Litton—relied primarily on North Carolina v. Pearce, 395 U. S. 711 (1969), Blackledge v. Perry, 417 U. S. 21 (1974), and their progeny. These cases hold that after a defendant has succeeded in having his initial conviction vacated, the due process clause protects him from the vindictive imposition of an increased sentence on retrial and from fear of retaliation by either a judge or prosecutor. The Supreme Court, however, refused to apply these cases to Hayes's situation. The Court recognized that the prosecutor's threat to procure another indictment was designed to deter Hayes from exercising his right to plead not guilty. It emphasized, however, "that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." Bordenkircher v. Hayes, 98 S. Ct. at 667-68. It concluded that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." 98 S. Ct. at 668. Applying these principles, the Court sustained Hayes's conviction.

Litton's situation is essentially like Hayes's. Although the prosecutor did not threaten to indict Litton if it rejected the proposal, he said that the fraud investigation would be continued to determine whether Litton should be indicted. Litton's Board award was not final; even if Litton rejected the proposal, the government could attack the award for fraud in the Court of Claims. 28 U. S. C. § 2514; *see* S & E Contractors, Inc. v. United States, 406 U. S. 1, 15-17 (1972). Nevertheless, Litton was asked to forego a right as a price for the government's termination

of the investigation. Specifically, Litton was asked to give up its right to bar the Board's reconsideration of its claims.

The district court did not find that Deputy Attorney General Tyler, Assistant Attorney General Thornburg, or Attorney General Bell, who made the critical decisions in this case, were vindictive or retaliative. The absence of such a finding is proper because the evidence would not support a contrary ruling.[2] Instead, the district court concluded that it was unlawful for the prosecutor to use the implied threat of indictment to deter Litton from exercising a legal right. But this is precisely what *Hayes* allows a prosecutor to do when he is bargaining with the potential defendant of a threatened indictment.

Litton protests that *Hayes* is distinguishable because the government lacked proof that Litton had committed a crime when the prosecutor offered his proposal. We do not believe this distinction is significant. The court of appeals granted Hayes a writ of habeas corpus in part because the prosecutor had known about Hayes's recidivism when he obtained the initial indictment charging uttering a forged check. This prior knowledge, the court of appeals reasoned, justified a conclusion that vindictiveness alone motivated the prosecutor in obtaining the subsequent indictment. *See*, Hayes v. Cowan, 547 F. 2d 42, 44 (6th Cir. 1976). The Supreme Court's recognition of the prosecutor's prior knowledge clearly put to rest the court of appeals's notion that this factor supported granting the writ. Indeed, in Blackledge v. Perry, 417 U. S. 21, 29 n. 7 (1974), the Court explained that a prosecutor's inability to proceed on a more serious charge at the time

2. Litton insists that an Assistant United States Attorney's remark—"Litton bought this indictment"—conclusively demonstrates vindictiveness. There is no evidence, however, that the Assistant, who was not in charge of trying the government's case, reflected the views of the officials in the Department of Justice who were responsible for instituting the criminal prosecution.

of the initial indictment would indicate that a subsequent indictment was not motivated by vindictiveness. Accordingly, we cannot accept Litton's argument that *Hayes* is inapplicable. We do not believe that the Court intended to confine plea bargaining to those situations where the prosecutor possesses irrefutable proof of the most serious crime for which a defendant is ultimately prosecuted. A prosecutor's bargaining position should not be so circumscribed. This is not to say, however, that a prosecutor can employ deceptive tactics about the strength of his case to induce a bargain.

In this case the government did not engage in any deception. The attorney in charge of presenting the case to the grand jury candidly told Litton's attorneys that while the government had proof of false claims, it had not yet obtained sufficient evidence of willfulness and criminal intent to warrant prosecution. The government's lack of knowledge about criminal intent and the possibility of further investigation were factors that Litton could weigh in deciding whether to accept the government's proposal. The prosecutor's candor in revealing the weakness of the government's case dispels any notion of vindictiveness.

Litton also contends that the rejection of its belated acceptance of the government's proposal manifests vindictiveness and renders *Hayes* inapplicable. We find no merit in this argument. *Hayes* does not require a prosecutor to keep an offer of a bargain open indefinitely after it has been rejected. Again, we believe that a prosecutor's bargaining position should not be so closely circumscribed. There are many reasons why a prosecutor should be permitted to put a rejected offer aside and proceed with the development of the government's case. Certainly, after new evidence of the defendant's wrongdoing has been uncovered, prosecutors should not be bound by an

offer rejected months before when the case presented quite a different profile.

Finally, *Hayes* cannot be distinguished because it dealt solely with criminal proceedings while this case presents a mixture of civil and criminal litigation. In *Hayes* the prosecutor's threat did not violate the due process clause even though life imprisonment was at stake if Hayes rejected the offer and subjected himself to indictment. We cannot say that the government violated the due process clause in this case where rejection of its offer would not subject anyone to imprisonment and the issues are primarily monetary. The prosecutor did not even ask Litton to forego its award but only proposed that the Board should be authorized to reconsider it in light of information not previously available. Moreover, the prosecutor did not advance the proposal as a means of leverage against an unrelated claim. The material elements of both the civil and criminal proceedings were closely interwoven, and the proposal was an effort to resolve all facets of an essentially single controversy.

Therefore, applying the principles expressed in *Hayes*, we conclude that the government did not abridge Litton's right to substantive due process.

III

Litton also urges us to apply the familiar rule that the judgment of a court can be defended on any ground consistent with the record. Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U. S. 479 (1976); *see* C. Wright, Federal Courts 523 (3d ed. 1976). It therefore seeks affirmance of the dismissal of the indictment on grounds rejected by the district court. We agree with the district court that neither of these grounds warrants dismissal.

In May, 1976, after the Board announced its decision, a government attorney who was looking for a document

relating to the Litton claims contacted Administrative Law Judge Bird, who had presided over the Litton proceedings. Both the government and Litton had been unable to find the document, and since Judge Bird's opinion referred to it, a subpoena had been issued requesting his copy. Judge Bird did not have the document either. The attorney showed Judge Bird a later version of the document and asked whether he had considered it in reaching his decision.

In July, 1976, a federal agent interviewed Judge Bird and Judge Solibakke in an attempt to determine whether three documents submitted by Litton which the government's investigation suggested were inaccurate had been material to the decision of the board of contract appeals. Judge Bird responded that, since two of the documents in question were cited in his opinion, they were material to it, while the third, which was not cited, probably was not material. The agent who conducted the interview stated in his affidavit that he did not reveal any of the proceedings of the grand jury to the judges and that he had acquired the basis for all of his comments independently of the grand jury proceedings.

In September, 1976, the grand jurors requested a final session in order to hear testimony from a group of government officials, including Judge Bird and Judge Solibakke. The prosecutor told the court that, while he wanted to accommodate the grand jury, he believed the testimony of these officials would not be relevant, and therefore he would not request issuance of the subpoenas. The Court directed that the subpoenas be issued, but the two judges never testified because the term expired before they could be heard.

We conclude that these contacts present no grounds for dismissing the indictment against Litton. Initially, we

see no basis for finding governmental misbehavior in the May, 1976, communication during the search for the missing document or in the issuance of the subpoenas in August, 1976, by the district court. As for the allegations that grand jury materials were improperly revealed during the May and July contacts, we note that the district court made no finding that materials were actually revealed. But even assuming that they were, the proper remedy would not be dismissal of the indictment. United States v. Hoffa, 349 F. 2d 20, 43 (6th Cir. 1965), *aff'd on other grounds*, 385 U. S. 293 (1966); United States v. United States District Court, 238 F. 2d 713, 721 (4th Cir. 1956).

Litton also complains of the government's use of federal agents to summarize for the second grand jury the evidence heard by the first. But, citing Costello v. United States, 350 U. S. 359 (1956), the district court declined to rule that the use of hearsay evidence required dismissal of the indictment, especially since the indicting grand jury heard other evidence. After examining the record, we agree that nothing in the form or content of the government's presentation requires dismissal of the indictment.

The judgment is vacated, and the case is remanded for further proceedings.

JUDGMENT

(Filed April 4, 1978)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,

vs.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, for further proceedings consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,

versus

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

ORDER DENYING PETITION FOR REHEARING.

(Filed April 27, 1978)

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner, and Judge Russell.

For the Court,

WILLIAM K. SLATE, II
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 77-70-A

UNITED STATES OF AMERICA

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Defendant.

MEMORANDUM OPINION AND ORDER.

On April 6, 1977 a grand jury of this district, Alexandria Division, returned a one-count indictment charging the defendant with presenting a false and fraudulent claim to the United States Navy on or about May 26, 1972, in violation of 18 U. S. C. § 287.[1] That claim arose from a contract awarded the defendant, Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division (Litton) by the United States Navy in June, 1968, for the construction of three nuclear attack submarines. The defendant has filed, among others, a motion to dismiss the indictment on the ground of governmental misconduct in connection with the grand jury proceedings preceding the indictment.

1. "§ 287. *False, fictitious or fraudulent claims*

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

During the course of performance of the contract there were certain delays which resulted in increased costs of construction. After some preliminaries, on May 26, 1972, Litton forwarded to the Navy data supporting a previously submitted price proposal (the claim) to recover that portion of the cost increase attributable to the government. When no resolution of the matter could be reached, Litton appealed to the Armed Services Board of Contract Appeals (ASBCA) claiming a total reimbursement of approximately $30,000,000. The hearing before the ASBCA began on October 30, 1973, and concluded on March 7, 1974. On April 16, 1976, the ASBCA issued its decision awarding Litton over $16,000,000 on its claim. It is the May 26, 1972 claim which was the subject ultimately of the proceedings before the ASBCA and which the present indictment charges violated 18 U. S. C. § 287.

On March 17, 1975, after the conclusion of the hearing before the ASBCA but over a year prior to the time that body issued its decision, a grand jury was impanelled by this Court to investigate whether a crime had been committed by Litton in the submitting of the claim. After eighteen months this grand jury expired by operation of law [Fed. R. Crim. P. 6(g)] on September 17, 1976, without having returned an indictment against Litton. The decision of the ASBCA in the meantime had been filed on April 16, 1976, and Litton and the government on or about May 14, 1976 jointly agreed not to file motions for reconsideration of that decision.

On September 9, 1976, just prior to the expiration of the grand jury's term, at a meeting between the Assistant United States Attorney in charge of the case and attorneys for Litton, the former offered to terminate the investigation and not seek an indictment if Litton would agree to allow the proceedings before the ASBCA to be reopened and to permit evidence gathered by the grand jury to be

presented to the ASBCA. A similar offer was made on September 14, 1976. Litton rejected the offer on both occasions and subsequently by letter dated November 1, 1976.

The government characterizes the overtures in this way:

> On September 7, 1976, AUSA Dunham initiated contact with Vincent Fuller, then representing Litton, and suggested a meeting which occurred on September 9, 1976 in the offices of the United States Attorney. At this meeting, Fuller was advised that the Grand Jury investigation indicated that the claim had been premised on an erroneous basis and decided by the ASBCA without benefit of all the facts. Fuller was further advised that, although the Grand Jury was expiring, further investigation would be required to determine whether Litton or any officer or employee of the company had deliberately allowed the claim to be premised on a factually erroneous basis, that is, it was made clear to Fuller that the primary open avenue of inquiry was the issue of criminal intent.
>
> Dunham explained to Fuller that he saw a possible way to resolve the intent issue in Litton's favor and thus eliminate further expenditure of resources by both Litton and the Government. Dunham stated he was reluctant to discuss it without assurances first being made that the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question. Fuller agreed with the ground rules laid out and encouraged the dialogue to ensue. He said he would terminate the talks at any time he deemed them inappropriate or improper. The suggestion was then made by the Assistant United States Attorneys that, assuming all

the details could be worked out, the ASBCA hearing be reopened with both sides having access to the investigation materials.

* * *

The suggested meeting commenced on September 14, 1976. Present were Lintz, Fuller, and Wilson, another retained criminal counsel, and Dunham, Fisher and Kibby, Assistant United States Attorneys. It was again unequivocably stated at the meeting's outset that before any discussion could ensue, there had to be assurances from Litton's side of the table that, at some later point in time, the discussions would not be used as a basis for an allegation of duress, threat, intimidation or other intimation of improper conduct on the part of the prosecution. Fuller, Wilson and Lintz all indicated they understood that the discussions were being had only with this mutual understanding. The Government then fully outlined the evidence developed during the Grand Jury investigation establishing that Litton's claim was false. This was followed by an in depth discussion participated in by all persons present on the mechanics that would be utilized to get a 6(a) Order and reopen the ASBCA proceedings. The meeting terminated on a cordial note.

Government's Response, pp. 4-6.

Following the expiration of the grand jury's term, the United States continued its own investigation of the matter and it asserts that this investigation revealed evidence of criminal intent which had been unavailable to the eighteen-month grand jury. Consequently, according to the government, it presented evidence to an existing grand jury which had been impanelled on July 19, 1976 in con-

nection with inquiries of other matters. This evidence was presented at various times during the period February 28, 1977 through March 10, 1977.

On March 11, 1977, perhaps sensing an impending indictment, Litton offered by letter to do what had been suggested the previous September by government counsel. By then, however, the matter had progressed too far. Deputy Attorney General Thornburg had requested on January 17, 1977, that the matter be presented to a new grand jury for the purpose of seeking an indictment, and on February 7, 1977 the Attorney General personally approved prosecution of the case. Before the grand jury two special agents of the FBI summarized the matters that had been presented to the previous grand jury. Counsel represented at argument on this motion that the summary and presentation of additional evidence took approximately six days. The previous grand jury, during its eighteen-month tenure, had considered the matter for a total of approximately twenty-five days.

It appears from the uncontroverted affidavit of defense counsel that at a meeting held on April 19, 1977, the Assistant United States Attorneys stated that there had been no requirement of the two agents:

> 1. To read and review all of the matters occurring before the eighteen-month investigating grand jury;
>
> 2. To restrict their summary presentations to those matters occurring before the eighteen-month grand jury;
>
> 3. To distinguish between hearsay and personal knowledge; and
>
> 4. To distinguish between matters occurring and not occurring before the eighteen-month investigating grand jury.

At the same meeting, one of the Assistant United States Attorneys involved in the case stated to counsel for the defendant that "Litton bought this indictment."

* * * *

No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a "second bite at the apple" in its controversy with Litton over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when Litton, as was its right, refused to forego that entitlement, namely, the finality of the civil award, the government retaliated—made good its threat—by producing an indictment. This is a serious abuse of prosecutorial power.

The government's position is that during the investigation before the first grand jury incriminating evidence was uncovered which led the prosecutors to believe that the claim as submitted to the ASBCA was false, although there was no evidence before the grand jury of criminal intent; that their attempt to resolve the matter without an indictment was motivated by a desire to see that the ASBCA had the entire picture—to let Litton prove its innocence if it had nothing to hide; and that the deal had many attractive features from Litton's point of view.[2] This misses the point of its misconduct. Had the bargain been proposed *after* indictment it arguably could be justified, but what is reprehensible here is the *threat* to use, as *well* as the actual use of, the grand jury as a bargaining

2. The government points out that the bargain as offered could possibly have resulted in Litton's obtaining a higher award and the government could not assert fraud as a defense to the claim before the Court of Claims. The "bargaining," however, was hardly at arm's-length. With a grand jury investigation in the background, the United States enjoyed substantial leverage in making its proposal.

tool in an effort to upset the final civil award to which Litton was entitled.[3] Rather than ". . . security against hasty, malicious and oppressive prosecution; . . . standing between the accuser and the accused. . . ." *Wood v. Georgia*, 370 U. S. 375, 390 (1962), the grand jury here was used to formulate a ". . . charge . . . dictated by an intimidating power . . ." *ibid.*

The Government's analogy of the procedure followed here to that followed in a Pretrial Diversion Program is misplaced. The Pretrial Diversion Program is a judicially sanctioned plan designed for rehabilitation of persons *who admit their guilt*, without formal charges being brought. Here, not only at a time when the defendant was protesting its innocence, but at a time when the government, according to its brief, had no evidence of criminal intent,

3. The perception of the grand jury as an intimidatory device was implicit in the Assistant United States Attorney's statement at the April 19, 1977 meeting. In his opinion, by refusing to agree to a reconsideration of the award it had gained through the ASBCA, Litton had brought the indictment upon itself.

4. "The investigation had established beyond peradventure of a doubt that the claim was false. The only remaining issue was the presence or absence of criminal intent. Although the net effect of what was done in the company's name was egregious, the evidence of wrongdoing by particular individuals was not then of a character to convince the Department of Justice that any *individuals* should be indicted, although certain individuals were being considered as possible targets. The individuals considered as potential defendants with the exception of shipyard president Neil Marandino were low to middle level management people in positions sufficiently significant enough to bind the corporation with their conduct but as to whom no direct benefit could be discerned as having been derived from participating in the assembly of a false claim. The only direct beneficiaries of the wrongful conduct assuming intent could be established, was the company and the highest echelons of its management. But there was no evidence that these individuals had ever read what had been submitted in Litton's name. After review of the matter in the Department of Justice, the company itself appeared to be the foremost criminal target assuming that additional evidence on willfulness could be developed and obtained through further investigation." Government's Response pp. 3, 4.

the investigating grand jury was used as a bargaining tool to effect a reopening of the matter before the ASBCA.

Nor does the claim of waiver by the United States validate its conduct in this case. One need only put himself in the shoes of counsel for a putative defendant being investigated by a grand jury to recognize how little choice such counsel would have when approached by an Assistant United States Attorney with a proposition contemplating termination of the investigation. What prudent lawyer would not have acceded readily to the stipulation that any discussion would not be considered fraud or coercion? But the exaction of such a condition does not make the circumstances less coercive, and it is no comfort to the government here.

At least one circuit court of appeals, in the exercise of its supervisory power, has directed a dismissal of an indictment returned solely on hearsay testimony in an extreme case, e.g., *United States v. Estepa*, 471 F. 2d 1132 (2nd Cir. 1972). This Court, however, is unwilling to dismiss the indictment on that ground in view of the unequivocal and as yet unrepudiated language in *Costello v. United States*, 350 U. S. 359 (1956), especially since here there was evidence other than the summary presented to the indicting grand jury. In the case of *In re Grand Jury Investigation of Banana*, 214 F. Supp. 856 (D. Md. 1963), cited by the defendant, the Court condemned the practice followed here, but the action there was the prohibition of future conduct rather than a dismissal of the indictment.

The appearance and summation testimony before the grand jury of the two agents is relevant, however, to the issue of the misconduct of the United States Attorney's Office. One need not be a skeptic to question the impartiality of a presentation which persuaded a grand jury that neither had heard nor seen the previous witnesses or documents to do within ten days what the prior grand jury

had not seen fit to do after twenty-five days of evidentiary hearing over an eighteen month period. This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney.

The government's suggestion to *reopen* the matter before the ASBCA ominous when considered with the fact that after the Board's decision was rendered but while the first grand jury was still in existence and prior to the September overtures to the defendant by the United States Attorney's Office, the government caused subpoenas to be served on the judge who presided at the ASBCA hearing, and the Chairman of the ASBCA (who was one of the four concurring judges in the ASBCA decision). They did not actually testify before the grand jury, but on or about May 21, 1976, a Special Assistant United States Attorney, and on or about July 21, 1976 two FBI agents interviewed the presiding judge relative to whether and to what extent matters disclosed before the grand jury had been considered by the ASBCA in its decision. The extent to which such matters were revealed in the interview is not shown by the record; however, no order allowing disclosure was obtained as provided for by Fed. R. Cr. P. 6(e). Such activity could only carry the potential for depreciation of the ASBCA's impartiality and vitiation of its decisions in any reopened claim or in future claims involving the defendant.[5]

It is entirely possible that upon trial Litton would be found guilty of presenting a false or fraudulent claim; however, when prosecutorial discretion is abused, as here, dismissal of the indictment as a prophylaxis is warranted. *Cf. United States v. DeMarco*, 550 F. 2d 1224 (9th Cir. 1977). While the circumstances here do not carry the procedural

5. It is represented that Litton has pending before the ASBCA claims totalling in excess of $900,000,000.

"due process implications" found to support the dismissal in *DeMarco*, the Court has no difficulty discerning abridgment of the defendant's substantive due process rights in permitting the government's conduct. The determination and review of civil disputes such as the one at the core of this prosecution is governed by an established statutory and regulatory scheme. Allowing the government to circumvent the finality otherwise accorded the administrative resolution of contract disputes by threatening criminal prosecution in substance abrogates the private party's right to hold the government to its own rules. At the very least the Court is warranted in exercising its supervisory power over federal prosecutors where there is present deliberate and disingenuous conduct.

The foregoing resolution of the matter renders it unnecessary to face the issue presented by the other motion on which the Court reserved decision, namely, the defendant's motion for a change of venue under Fed. R. Cr. P. 21(b). Should the Court now or in the future be required to face the issue it would be inclined to grant the motion. The indictment was presented in this district because the allegedly false claim was presented to the contracting officer whose office by mere happenstance is located here. The failure of Litton to request an on-site hearing in the civil administrative appeal proceeding which it initiated ought not to foreclose it from asserting its right to be tried criminally elsewhere if the requirements for a 21(b) transfer otherwise exist. And they do. *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U. S. 240 (1964). The defendant's offices and shipyard, where the work which formed the basis of the claim was performed, are located in Mississippi. The numerous (approximately 69 according to the defendant) defense witnesses for the most part are located there, and the inconvenience inherent in requiring them to come to Virginia for what may be

a lengthy trial is readily apparent. The events likely to be in issue also occurred in Mississippi and the documents and records involved in the case are there. Some disruption of Litton's business is bound to take place if its witnesses have to be this far from its place of business. While the Court cannot at this time determine whether a view of the location is necessary, this has been done in ASBCA proceedings other than those involved here and that body apparently found it helpful in its resolution of the matters in controversy. The expense of the trial for the defendant undoubtedly would be greater if the trial was conducted in Virginia rather than Mississippi; such expense would include, among other things, the employment of local counsel as well as payment for travel and maintenance for defendant's Mississippi counsel [6] and witnesses. The only factor weighing in favor of retaining the case in this district and division is convenience for the Department of Justice. This is not entitled to a great deal of weight. The presumption that the proper location for trial is the place of indictment and of the technical commission of the alleged fraud has been overcome. The above discussion illustrates that for the convenience of the parties and witnesses and in the interest of justice, the case most appropriately should be prosecuted in the Southern District Mississippi. The latest statistics from the Director of the Administrative Office of the United States Courts show that district as having a much lighter criminal docket than this district, an expeditious handling of its criminal docket and a docket no more congested than the one here.

Since argument on May 20, 1977 of the motions discussed in this Memorandum, the Court has received daily and sometimes twice daily communications from counsel

6. A transfer would not decrease all expenses for counsel in view of the appearance of attorneys from Philadelphia, but it would eliminate some duplication of travel expenses.

on both sides in the form of letters and affidavits. The Court has examined and considered the matters raised in these addenda and believes them to be irrelevant to its decision. They do not alter the Court's judgment.

For the foregoing reasons the indictment is dismissed; and it is so ordered.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia

May 25th, 1977

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4064

D. C. Docket No. CR-78-00031-R

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi

Before BROWN and RANDALL, *Circuit Judges*, and HUNTER*, *District Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said district court for further proceedings not inconsistent with the opinion of this Court.

January 13, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4064

UNITED STATES OF AMERICA,
Plaintiff-Appellant

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1/13/84, 5 Cir., 1984, 722 F.2d 264)

(February 7, 1984)

Before BROWN and RANDALL, *Circuit Judges*, and HUNTER*, *District Judge*.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

March 12, 1979

The Honorable Dan M. Russell, Jr.
United States District Judge
Post Office Box 1930
Gulfport, Mississippi 39501

Re: *United States of America* v. *Litton Systems, Inc.*,
Cr. No. S78-00031(R), (S.D. Miss.) Southern Div.

Dear Judge Russell:

On March 8, 1979 we received in the United States Attorney's office here in Alexandria, Virginia, copies of several motions and, in some instances, supporting memoranda of law, prepared by the Philadelphia law firm, which together with Messrs. Brunini, Hughes, and Adams of Jackson, represent Litton Systems, Inc. in the captioned case. We also received a copy of a letter, dated March 7, 1979, under signature of E. L. Brunini, Esq., addressed to you, and after reading it, feel constrained to make some brief comments in response.

We appeared before you in open Court on January 25, 1979 for a status conference; as Mr. Brunini observes in his correspondence to you both parties to the litigation made numerous representations and suggestions including, requests by both sides for the setting of a trial date, a request by the United States for counter-discovery, an application by both parties to waive the provisions of the Speedy Trial Act, and, on Litton's part, a request to reopen old motions for reconsideration already ruled upon by Judge Bryan and in certain significant instances reviewed by the Fourth Circuit Court of Appeals. Lastly, Litton requested an opportunity to file 'new' motions. Upon the conclusion of a full day in court, three matters were settled, we believe, with definity.

Firstly, your Honor entered an Order endorsed by both parties wherein both Litton and the United States agreed to waive the provisions of the Speedy Trial Act. Secondly, in that ". . . access to defense documents is a necessary adjunct to scheduling this case for trial and because Rule 16 of the Federal Rules of Criminal Procedure permits counter-discovery . . ." this Court

entered an Order requiring Litton to turn over copies of any documents it intends to use at trial to the Government within sixty days of January 25, 1979. And, lastly, your Honor entered an Order directing both parties to file any and all motions they are inclined to file within forty days of the January 25 status call date, with provision for both parties to file objections within ten days if either side believes that any of the motions filed have already been disposed of either before the District Court in Alexandria, or by the Fourth Circuit.

Your Honor's Order pertaining to the filing of motions continues by its terms to state that after objections are lodged with the Court, a date will be set for a hearing. Continuing, the Order concludes ". . . if the objections of either party are not sustained as to any motion or motions, the Court will then set a time for the filing of a substantive response and for a hearing on the merits of said motion. The times then set will also apply to responses to motions as to which no objection has been raised on the grounds of prior adjudication." We believe your Honor's Orders are, by their terms, clear beyond cavil; we have included copies under cover of this letter for your Honor's perusal.

We have reviewed Littion's motions, and are of the view that only one of them can properly be characterized as "new"; that is, their motion for an order providing that the trial of this case be by non-jury over the objections of the United States. Their other motions, we shall demonstrate by way of separate and formal objections, have already been previously disposed of. We believe the thrust of Litton's effort is to seek reconsideration of matters already put to bed, and, more importantly, an attempt to circumvent the clear term of your Order mandating counter-discovery.

In their letter to you of March 7, 1979, Litton's counsel state that they "suggested" and that you "concurred" that Litton's motions to dismiss the indictment (a) on the ground of the running of the statute of limitations, (b) on the ground of the Government's violation of Rule 6(e), and (c) its Motion to enter an Order in Limine, should be fully briefed and argued by Government counsel within ten days *and* heard on the merits *before* any of Litton's other motions are reached. We believe this sug-

gestion is again a clear circumvention of the terms of your Order; indeed we believe the issue is not what counsel might or might not like, but rather whether this Court's Order shall be obeyed to the letter. We believe the clear import of your Honor's ruling requiring both parties to make their objections to motions within ten days, and to then have a hearing on those objections, is to obviate what seems to us to be your Honor's clear disinclination to rehear what has already been ruled upon and disposed of by Judge Bryan in Alexandria, and by the Fourth Circuit. Accordingly, as required by the Order of this Court, within ten days we shall file our objections which we believe to be appropriate to those of Litton's motions.

Additionally, we object to Litton's attempted circumvention of your Order requiring them to commence the process of counter-discovery. We believe the intended effect of Litton's refusal to comply with the counter-discovery Order is nothing short of an attempt to make it that much more difficult for your Honor to be able to focus upon the issues in the case (which we believe to be relatively straight forward and simple) and thus to further delay the setting of a trial date.

In the last paragraph of their March 7, 1979 correspondence, Litton's counsel suggests to you that the Government's attorneys ". . . will concede the obvious fact . . ." that Litton's Motion for an Order in Limine will have a very substantial effect upon the selection of trial documents to be used by both parties. That well may be true or not. However as we view our obligations under the orders you entered on January 25, 1979, they are simply to file objections where we deem them appropriate, to Litton's motions, and then await your rulings and further directions at the hearing.

In closing, we note we have no objections to Litton having seven days after our objections to their motions are filed, to file any reply they might wish to lodge to our objections, provided it does not further delay the hearing date on the objections, and further provided your Honor is inclined to permit to be filed.

Awaiting any further directions from this Honorable Court, we remain,

Very truly yours,

WILLIAM B. CUMMINGS
United States Attorney

By: _____
Joseph A. Fisher, III
Assistant United States Attorney

cc: Office of Hon Dan M. Russell, Jr.
Jackson, Mississippi
Clerk of the Court, S. D. Miss.
E. L. Brunini, Esquire
Bruce W. Kauffman, Esquire

Of Counsel:
Honorable Robert E. Hauberg
United States Attorney for the Southern District of Mississippi

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Criminal No. 578-0031(R)

UNITED STATES OF AMERICA
v.
LITTON SYSTEMS, INC., d/b/a
Ingalls Nuclear
Shipbuilding Division

AFFIDAVIT OF ROBERT E. DAVIS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR INEXCUSABLE AND PREJUDICIAL PROSECUTORIAL DELAY AND LOSS AND DESTRUCTION OF EXCULPATORY EVIDENCE

STATE OF MISSISSIPPI :
: ss:
COUNTY OF JACKSON :

ROBERT E. DAVIS, being duly sworn according to law, deposes and says that:

1. He is Associate General Counsel for Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division.

2. This affidavit is filed in support of defendant's motion to dismiss the indictment on the ground of inexcusable and prejudicial prosecutorial delay.

3. The facts set forth hereinbelow are true and correct to the best of his knowledge, information and belief.

4. The facts underlying this case began more than fifteen years ago, on August 11, 1967, when the United States Navy addressed a request for proposals for the construction of six nuclear submarines to Ingalls and other shipyards. On March 4, 1968, Ingalls submitted its proposal and on June 25, 1968, more than

fourteen years ago, Ingalls and the Navy entered into a written contract for the construction of three nuclear submarines ("the 680-series submarines").

5. During the performance of that contract, the government disrupted Ingalls' construction schedule by: (a) immediately after the contract award instructing Ingalls to delay delivery by eleven and one-half months; and (b) failing to support the new schedule by making untimely and out of sequence deliveries of government furnished steel and other material. In July, 1970, Ingalls and the government amended the contract to require Ingalls to submit a proposal to adjust the contract. Accordingly, twelve years ago, on November 30, 1970, Ingalls submitted to the Navy a proposal to adjust the contract seeking compensation for the increased costs which had resulted from the government-caused delay and disruption.

6. The government immediately commenced its customary thorough evaluation of Ingalls' proposal to adjust the contract. In connection therewith, as set forth by the affidavit of the former head of the Navy Ship Production Office, Marvin B. Miller, the Navy Ship Production Office requested and received copies of all records relevant to Ingalls' scheduling for construction of the 680-series submarines. Ingalls opened its files to the government teams evaluating the proposal to adjust the contract, but kept no records of the enormous quantity of documents produced to and copied by the government. It is therefore impossible to identify those documents other than by reference to the government's copies. As late as the spring of 1977, after the return of the indictment, fifty-five boxes of the government's copies of Ingalls' records had been preserved. Despite repeated motions and requests and an outstanding court order that these records vital to Ingalls' defense be produced, the government has admitted that it destroyed at least some of these records after the Court ordered that they be produced and the location of the remaining records remains concealed.

7. Following Ingalls' November 30, 1970 proposal to adjust the contract and the government's extensive evaluation thereof, including review of all of Ingalls' pertinent records underlying

the request, extensive settlement negotiations took place. Settlement was not achieved, however, and on July 31, 1972, the Navy's Contracting Officer awarded Ingalls an increase of approximately $3.8 million in the 680-series submarine contract price and in new escalation provisions.

8. Pursuant to the disputes clause in the 680-series submarine contract, Ingalls appealed the Contracting Officer's decision to the Armed Services Board of Contract Appeals ("ASBCA"). Trial commenced before the ASBCA on October 30, 1973, and concluded on March 7, 1974 after sixty-nine days of testimony. On April 16, 1976, a five-judge panel of the ASBCA rendered a unanimous 116-page final decision awarding Ingalls more than $16 million. *Appeal of Ingalls Shipbuilding Division*, 76-1 BCA Decisions ¶11,851.

9. On March 17, 1975, during the time that the parties were awaiting the ASBCA decision, a special grand jury was empanelled in the Eastern District of Virginia to investigate the submission of Ingalls' claim. That grand jury expired after 18 months of investigating only Ingalls without returning an indictment. Prior to the empanelling of the special grand jury, testimony regarding Ingalls' request for equitable adjustment had been heard by two regular grand juries.

10. In September, 1976, shortly before the expiration of the special grand jury's term, the prosecutors threatened Ingalls with indictment, although they admittedly then lacked sufficient evidence to indict, unless Ingalls agreed to reopen the ASBCA proceeding. When Ingalls refused to surrender its final ASBCA award, the prosecutors made good their threat. Within a matter of months, a fourth grand jury was presented with six days of testimony by two FBI agents who purported to summarize the matters that had been presented to the previous special grand jury. These agents were not required to restrict their summary presentations to matters presented to the special grand jury or to distinguish between hearsay and personal knowledge. Indeed, the two FBI agents were not even required to read and review *all* the matters occurring before the 18-month special grand jury.

11. On April 6, 1977, ten years after the initial request for proposals and more than six years after the allegedly false request was submitted to the Navy, the government, without any additional substantive evidence, obtained the present one count indictment accusing Ingalls, but not any individual. Astonishingly, no individual has been charged with having the requisite intent to commit the alleged crime even though the sole corporate defendant is incapable by itself of forming the necessary wrongful intent.

12. On May 2, 1977 — less than a month after the indictment — Ingalls filed several pre-trial motions, including a motion to dismiss on the grounds of prosecutorial misconduct arising out of the government's threat to indict — at a time when it admittedly lacked even *prima facie* evidence that a crime had been committed — unless Ingalls surrendered its right to enforce the final award it had obtained before the ASBCA. On May 25, 1977, the United States District Court for the Eastern District of Virginia dismissed the indictment for governmental misconduct. In a sharp reprimand, the Court held:

> No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a "second bite at the apple" in its controversy with [Ingalls] over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what [Ingalls], presumptively innocent, was otherwise entitled to; and that when [Ingalls], as was its right, refused to forego that entitlement, namely, the finality of the civil award, the government retaliated — made good its threat — by producing an indictment. This is a serious abuse of prosecutorial power.

Slip Opinion at pp. 5-6.

13. Faced with this condemnation of prosecutorial misconduct, the government appealed to the United States Court of Appeals for the Fourth Circuit. That Court reversed the dismissal, without, however, overturning any of the District Court's factual findings. Instead, the sole basis for the reversal was the Fourth Circuit's conclusion that in *Bordenkircher* v.

Hayes, 434 U.S. 357, the Supreme Court sanctioned governmental conduct of this sort as "permissible plea bargaining." *United States v. Litton Systems, Inc.*, 573 F.2d 195, 199 (4th Cir. 1978).

14. Thereafter, on December 8, 1978, after Ingalls' Petition for a Writ of Certiorari had been denied, the United States District Court for the Eastern District of Virginia granted Ingalls' motion to transfer to this district.

15. A status conference was held on January 25, 1979, and on the next day this Court established an orderly, four step pretrial procedure for the briefing and hearing of pre-trial motions. The January 26, 1979 Order provided that:

1. All motions were to be filed within forty days;

2. Any objections to consideration by the Court of such motions were to be filed within ten days thereafter;

3. A hearing was to be scheduled on the objections; and

4. If objections were denied, substantive briefs were to be filed and a hearing on the motions scheduled.

16. On March 7, 1979, Ingalls filed several motions pursuant to the January 26, 1979 Order, including: (1) a motion raising the applicable statute of limitations; (2) a motion raising the government's violation of Rule 6(e) of the Federal Rules of Criminal Procedure; and (3) a motion seeking to prohibit the relitigation of factual issues previously decided in the related ASBCA litigation.

17. Although the government filed objections on March 19, 1979, seeking the dismissal of all but one of Ingalls' motions, it thereafter abruptly discontinued all further efforts to prosecute for three and one-half years. Indeed, the government has failed to bring on its objections for hearing even to this day.

18. The government not only failed to take a single prosecutorial step during this three and one-half year period, it made it unmistakably clear that it *never* intended to try this case. Among other things:

1. On November 20, 1979 — three years ago — the government proposed language to be included in a draft settlement agreement which expressly recognized that this prosecution was stale even then:

> 5. "*Both parties to this agreement recognize that the evidence upon which* a civil or *criminal fact finder* would have to base ultimate conclusions concerning the state of mind with which the [allegedly] incomplete and inaccurate cost and pricing data was submitted, consists *largely of testimony surrounding events which occurred nine to eleven years ago and has thus become "stale" by the mere passage of time*." (Emphasis added).

2. In March, 1978 the government paid Ingalls the full amount of its ASBCA award. In November, 1980, the government paid Ingalls an additional $1.6 million which had been withheld by the government as its "guaranteed delivery claim." by that time, all other disputes between Ingalls and the government relating to the 680-series submarines had been finally settled.

3. There was an unmistakable contrast between the vigor with which the government prosecuted this matter prior to transfer to this Court and its total inactivity thereafter.

19. Moreover, as found by Judge Bryan, the prosecution had been brought for retaliation. Since the ASBCA had decided in Ingalls' favor most if not all of the facts at issue, the likelihood of conviction solely against the corporation was remote, at best, in view of the burden of proof required in criminal proceedings.

20. In light of these circumstances, Ingalls hardly could be expected to have disagreed with the government's admission that the case was stale and would never be tried. Accordingly, the defense trial team was disbanded and the trial files were closed.

21. Absolutely *no* prosecutorial activity occurred in this case for three and one-half years. Then, in June, 1982, the *Washington Post* reported that Admiral Rickover had accused

the Justice Department of "scuttling" this prosecution. Admiral Rickover reportedly asserted that the government had made "no effort to bring this case to trial" since it was transferred to Mississippi in 1978. Reacting to the adverse publicity, the government filed a motion to set a trial date on September 22, 1982.

22. Since the April 6, 1977 indictment, seven material witnesses have died and the whereabouts of one witness are unknown. The dead witnesses are: Messrs. Adams, Poplowski, Scott, Humphries, Dickens, Verseckis, and Grey. The missing witness is Mr. Bosley.

23. During the extraordinary delay in this case, Navy personnel who could provide exculpatory testimony have also died. For example, Gordon Rule, who died on August 10, 1982, was Chief of the Contract Clearance Branch, Office of the Chief of Navy Material. He approved modification 5 to the 680-series submarine contract, which required Ingalls to submit a proposal to adjust the contract, the alleged false claim, to the Navy. As a result of his involvement with the 680-series submarine contract, Mr. Rule would have been familiar with the government's instruction that Ingalls delay delivery of the submarines for eleven and one-half months, and the government's failure to deliver government-furnished equipment and material, including steel, according to schedule — two issues directly placed in controversy by the government's Bill of Particulars, at pp. 24 and 30. Because of the government's inexcusable delay in this case, this potential source of exculpatory evidence has been lost.

24. By far, the most important witnesses in this case are David Adams and John Poplowski, both of whom have died, and Donald Bosley, whose whereabouts are unknown. Indeed, in its Bill of Particulars, the government itself has declared these three witnesses to be of critical importance by asserting that they participated in the preparation of the allegedly false claim and caused the submission of the allegedly false claim, and revisions thereto, to the Navy (Government's Bill of Particulars, pp. 3, 4, 6, 8, 9 and 29). These men were the only ones involved in the preparation of the manpower charts on pages 39 and 41 of Ingalls' November 30, 1977 proposal to adjust the contract. At

page 30 of its Bill of Particulars the government identified these charts as the key to its theory of this case:

> "The theory of the government's case is simple. Ingalls claimed they were forced to subcontract hull work because of late government steel creating a platen overload. In truth they subcontracted because of lack of manpower and facilities due to causes unrelated to the delivery of government steel. The platen loading curve on the claim on page 10 is a phony.
>
> *Ingalls also claimed they could not complete the ships on time because of impossible manpower build-ups as depicted at pages 39 and 41 of the forty-two page narrative.*
>
> *These curves*, like the platen loading curve, are also *phony*. (Emphasis added).

The Ingalls employee who drew the charts on pages 39 and 41, which are alleged to be false, was David Adams. Adams died in approximately May, 1980, during the three and one-half years of inexcusable delay by the government. Also during the past three and one-half years, Donald Bosley, who directed that the charts be prepared and who suggested revisions which the government contends are false, retired, and his whereabouts are unknown. Poplowski, who conveyed Bosley's instructions respecting the charts to Adams, died in November 1977. Since the manpower charts on pages 39 and 41 of Ingalls' proposal to adjust the contract were prepared at Bosley's request *solely* by Adams and Poplowski, Ingalls has been deprived of the opportunity to present testimony to counter the government's theory and demonstrate that the subject charts were prepared in good faith and not pursuant to any wrongful purpose.

25. Bosley is also a very significant witness because he supervised the preparation of the platen loading curve on page 10 of the proposal to adjust the contract, which is the third chart alleged by the government to be "phony."

26. Jack Grey died in February 1979. Grey was Ingalls' Chief Estimator who made the estimate of man hours that was used in preparing Ingalls' bid for the 680-series submarine construction program. Grey's testimony would have been ex-

tremely important to demonstrate the accuracy, reasonableness and fairness of Ingalls' initial bid for the 680-series submarine contract and to counter the government's contention that the 680-series submarines were underbid.

27. Curtis Scott, an Ingalls hull foreman, died in March 1981 during the inexcusable three and one-half year delay. His testimony would have been important to Ingalls to demonstrate the effect of the government's late and out-of-sequence delivery of steel on the construction of the 680-series submarines.

28. Keistutis Verseckis died on September 13, 1980, also during the three and one-half year delay. Since Verseckis was an accountant who prepared escalation calculations used in the proposal to adjust the contract, his testimony would have been important to the defense to substantiate the fairness, accuracy and reasonableness of the request.

29. J. Marshall Dickens died on January 24, 1981. Dickens worked in contract administration, and his testimony would have been important to substantiate Ingalls' contention that it intended to delay construction of other ships known as the Falcons to accommodate the construction of the 680-series submarines. This issue is important because the government contends that the construction of the Falcons interfered with the construction of the 680-series submarines.

30. George Humphries died in November 1978. He also would have been a critical witness, because in its Bill of Particulars the government designated him as one of the individuals who participated in the preparation and submission to the Navy of the allegedly false claim and revisions thereto. (Government's Bill of Particulars, pp. 3, 4, 6, 8, 9 and 29). In addition, Humphries was an industrial engineer who testified at the ASBCA trial regarding loss of learning calculations, a component of damages claimed in Ingalls' proposal to adjust the contract.

31. Since the return of the indictment in 1977, the government has lost or destroyed documents critical to Ingalls' defense. These lost or destroyed documents fall into two categories: (i) production audit documents; and (ii) source selection documents.

32. Following the November, 1970 submission of the proposal to adjust the contract, the Department of the Navy thor-

oughly investigated the documents which Ingalls relied upon to support its request and had incorporated by reference therein. As set forth in the Affidavit of Marvin B. Miller, the government was given complete access to all of Ingalls' documents. The documents so produced, together with any government analysis thereof, are critical to the defense since they demonstrate that:

> 1. Any alleged errors in the proposal to adjust the contract were corrected by the production of underlying source documents; and
>
> 2. From its own analysis of Ingalls' documents, the government knew the true facts before it made any decision respecting Ingalls' proposal to adjust the contract.

In short, the documents submitted by Ingalls to the government during the production audit refute the allegation of criminal intent required for conviction under 18 U.S.C. §287.

33. Following the April 1977 indictment, Ingalls moved for production of documents under Rules 16 and 17, F.R.Crim.P., and the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963). At a hearing conducted on May 13, 1977, Assistant United States Attorney Frank Dunham and Sandra Adkins, Esquire, an attorney representing the Department of the Navy, agreed to produce all of the records in the Navy's possession relating in any way to the equitable adjustment request which is the subject of the present indictment (Transcript, Hearing of May 13, 1977 at p. 34):

> MR. DUNHAM: No objection. In fact, I understand from the Navy they are willing to provide a room for these gentlemen to go up to the Navy, and look at everything they've got in their files, and they will just bring it in to them, box by box, and they can look at it all.
>
> THE COURT: If you are representing that the Navy will let them look at it, and they have no objection, the Court won't object.
>
> SANDRA ADKINS: That is correct, your Honor.

Accordingly, the Court ordered that production of Navy documents commence on May 16, 1977 (Transcript, Hearing of May 13, 1977, at pp. 34-35).

34. As set forth in ¶5 of the Affidavit of Marvin B. Miller, there were at least fifty-five boxes of documents copied by the government in connection with its investigation of Ingalls' proposal to adjust the contract. Ingalls kept no record to identify the enormous number of its documents which the government chose to copy, and since these documents have never been produced, Ingalls has no way of proving which of its documents were made available to and copied by the government. Moreover, the documents reflecting the government's analysis and conclusions have never been produced. Indeed, as admitted by an assistant counsel for the Department of the Navy, Debra B. Demirali, in a letter dated December 19, 1979, at least some of them have been destroyed, notwithstanding the May 13, 1977 Order of the Court that they be produced.

35. Prior to award of the 680 submarine contract, the government conducted a source selection review to confirm for itself Ingalls' manpower and facilities capability. This issue is critical to the defense because the government contends that Ingalls lacked sufficient manpower and facilities to perform the 680 contract according to schedule at the time of its bid. Obviously, if the government's own investigation concluded to the contrary, Ingalls has an unassailable defense to the government's present theory of the criminal case.

36. In late 1979, however, during the three and one-half year period of inexcusable delay, Ingalls was informed that two boxes of source selection documents had been lost by the Navy. This was admitted in the December 19, 1979 letter from Navy attorney Debra B. Demirali, which was written in response to inquiries concerning Ingalls' requests for documents pertinent to the proposal to adjust the 680 contract.

_____

Robert E. Davis

Sworn and subscribed
before me this day
of . 1982

_____

Notary Public

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Criminal No. S78-0031(R)

UNITED STATES OF AMERICA
v.
LITTON SYSTEMS, INC. d/b/a
Ingalls Nuclear
Shipbuilding Division

AFFADAVIT OF ROBERT E. DAVIS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT FOR INEXCUSABLE AND PREJUDICIAL PROSECUTORIAL DELAY AND LOSS AND DESTRUCTION OF EXCULPATORY EVIDENCE

ROBERT E. DAVIS, being duly sworn according to law, deposes and says that:

1. He is Associate General Counsel for Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division.

2. This affadavit is filed in support of Defendant's Motion to Dismiss the Indictment On The Grounds of Inexcusable And Prejudicial Prosecutorial Delay.

3. The facts set forth hereinbelow are true and correct to the best of his knowledge, information and belief.

4. In May, 1977, after the indictment in this case, I interviewed David Adams, the Ingalls' employee who drew the manpower charts which the government contends are false, respecting critical evidence to the defense of this case that is not contained in Adams' grand jury testimony.

5. Adams stated:

(a) Preparation of charts similar to the manpower charts at issue in this case was a familiar and frequent task;

(b) No one told Adams to falsify the manpower charts in any way and he did not do so;

(c) The manpower charts were done as a "rough order of magnitude" to show a general picture rather than a precise one.

(d) At the time Adams drew the manpower charts, he did not know the purpose for which they would be used;

(e) Contrary to the government's contention that some of the curves depicted on the manpower charts were drawn free-hand, the curves were plotted from underlying manpower spread sheets which were already in existence;

(f) Because the underlying manpower spread sheets were dated November 5, 1969, it was appropriate, truthful, and correct to date the charts November 5, 1969. The government's contention that the manpower charts were improperly backdated is wrong.

_____

Robert E. Davis

Sworn to and subscribed before me
this 23rd day of November, 1982.

_____

Notary Public
My Commission Expires
November 7, 1983

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA	PLAINTIFF
versus	NO. S78-00031(R)
LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION	DEFENDANTS

* * * * *

BE IT REMEMBERED, to-wit: That the following Motion came on to be heard in the United States District Court for the Southern District of Mississippi at Biloxi, Mississippi, on Monday, December 20, 1982 before the HONORABLE ADRIAN DUPLANTIER.

APPEARANCES:

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REPRESENTING THE DEFENDANTS

* * *

JUDGE DUPLANTIER: Counsel, but at the same time you tell me that had the Government ever said to you this case has to take precedence over something else which I am doing, I was ready to give it that precedence. The Government never asked you to do that. It never did. By your own statement. Not you. That's not your fault.

MR. DUNHAM: That's true.

JUDGE DUPLANTIER: It's not your fault at all.

MR. DUNHAM: They knew what my requirements were.

JUDGE DUPLANTIER: Well of course and they never asked you to alter them. They never did. That's the problem. They weighed that against something else and said, well we're not in a hurry so we'll—

MR. DUNHAM: Well, Your Honor, one thing—

JUDGE DUPLANTIER: That's what was said. Nobody asked you to change your schedule.

MR. DUNHAM: One thing that the Court has to keep in mind, I believe, is the fact that the matters that had me occupied, I was adverse to the Government in. It would have been very unseemly for the Government to have asked me to alter my situation when I was adverse to them in the matter they were asking me to alter.

JUDGE DUPLANTIER: Well, you just got finished telling me seven and a half minutes ago that all the Government had to do was ask you and you would have been "Johnny on the spot".

MR. DUNHAM: I said that I would have attempted — I just told you, Your Honor, I said I would have attempted to organize my schedule in such a way that I could have accommodated them.

JUDGE DUPLANTIER: I understand that.

MR. DUNHAM: And I believe I made myself clear, Your Honor, that it is not something that I had complete control over. I had Judges in the District of Columbia and Eastern District of Virginia to deal with—

JUDGE DUPLANTIER: Nobody suggested that you had that. What I'm saying is that no attempt ever was made to mesh those schedules, and you have told me that, and I understand that. The Government never asked you to accommodate to an earlier trial date in this matter.

MR. DUNHAM: That's true Your Honor.

JUDGE DUPLANTIER: It sat still and said we're satisfied the way things are going.

MR. DUNHAM: That's exactly—Now that's—

JUDGE DUPLANTIER: That's it.

MR. DUNHAM: I don't quibble with that at all, Your Honor. That's correct.

JUDGE DUPLANTIER: Now the problem is, you know, how does that implicate the Defendant's rights under the constitution. That's it.

* * *

JUDGE DUPLANTIER: I understand your position. I understand it. But again, I say, that certainly the Government

could never convince me that in reliance on that, for two years you did nothing.

The fact of the matter is that both sides were perfectly happy with the delay. That's what strikes me from the record, both sides, the Government and Litton.

The problem that I have to weigh is what is the Government's obligation with respect to that. Could the Government remain happy for twenty years and then say, "Well, you didn't ask for a speedy trial. We didn't. We were happy. You were happy. We now want to try the case." How about thirty years? How about eighteen? Four, six, where? That is really what is before me.

MR. DUNHAM: Your Honor, that impression that you just stated for the Court Reporter, I believe more succinctly states the proposition than I could put it. Both sides were perfectly satisfied with the fact that nothing was moving forward. Litton made no assertion of a speedy trial.

JUDGE DUPLANTIER: That's correct. The issue is where does that put you now?

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*	:	
v.	:	NO. 83-4064
LITTON SYSTEMS, INC. *Appellee*	:	

AFFIDAVIT OF EDMUND L. BRUNINI IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR A SECOND EXTENSION OF TIME AND IN SUPPORT OF APPELLEE'S MOTION TO DISMISS THIS APPEAL

EDMUND L. BRUNINI, having been duly sworn according to law, deposes and says that:

1. I am a member of the Bar of the State of Mississippi.

2. I respectfully submit this affidavit in support of appellee's opposition to the Government's motion for a second extension of time to file its appellate brief and in support of appellee's motion to dismiss this appeal pursuant to Federal Rule of Appellate Procedure 31(c).

3. This case was commenced in April, 1977 by the filing of a one count indictment alleging a violation of the False Claims Act, 18 U.S.C. §287, and I have been associated with the defense of Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division ("Ingalls"), ever since.

4. In May, 1977, the United States District Court for the Eastern District of Virginia dismissed the indictment for prosecutorial misconduct.

5. The United States Court of Appeal for the Fourth Circuit reversed, the Supreme Court of the United States denied Ingalls' petition for a writ of certiorari and this case was remanded to the United States District Court for the Eastern District of Virginia.

6. In December, 1978 this case was transferred to the United States District Court for the Southern District of Mississippi for trial.

7. From March, 1979 until September, 1982, a period of approximately three and one-half years, the Government failed to make any effort to prosecute this case.

8. In October, 1982 Ingalls moved to dismiss the indictment for inexcusable and prejudicial delay.

9. After hearing and oral argument, the District Court granted Ingalls' motion to dismiss the indictment on December 23, 1982.

10. The Government filed its Notice of Appeal on January 21, 1983. Accordingly, its appellate brief was due on or before April 4, 1983. (Federal Rule of Appellate Procedure 31(a).)

11. Orally on March 17, 1983, and by letter on March 18, 1983, Assistant United States Attorney James Metcalfe submitted to this Court an *ex parte* request for a three week extension of time for filing the Government's appellate brief.

12. The stated reason for this first request for an extension of time was that the Solicitor General had not yet decided whether to authorize this appeal.

13. The Government's first request for an extension of time was granted, and its time for filing its appellate brief was set for April 25, 1983.

14. In a letter dated March 25, 1983, attached hereto as Exhibit A, Ingalls notified the Government that it would vigorously resist any further request for extensions of time.

15. Nevertheless, the Government failed to file its appellate brief on April 25, 1983, but, in deliberate and flagrant violation of the Rules of Appellate Procedure, delayed until that very day to file a motion for a second extension of time for the manifestly non-compelling purpose of reviewing and editing its brief.

16. By December, 1982, seven critical defense witnesses had died.

17. During the pendency of this appeal, following triple by-pass heart surgery, an eighth critical defense witness, Robert E. Davis, Esq., died. Davis was named by the Government in its Bill of Particulars as one of the individuals who had allegedly

caused the submission of the claim which the Government contends is false. As long ago as 1977, Davis was listed by Ingalls as one of its defense witnesses. In addition, Davis was the affiant in the District Court in support of Ingalls' successful motion to dismiss the indictment for prosecutorial delay. Davis' affidavit detailed the prejudice incurred by Ingalls flowing from the Government's three and one-half year failure to prosecute this case. In particular, Davis outlined his personal knowledge of the exculpatory testimony which, but for his death during the period of prosecutorial delay, would have been given at trial by David Adams. With Davis' death it is now impossible to reconstruct Adams' testimony.

EDMUND L. BRUNINI

Sworn to and subscribed
before me this day
of , 1983.

Notary Public